No. 89-7645-CFY
Status: GRANTED

Title: Dionisio Hernandez, Petitioner
v.
New York

Docketed:
May 23, 1990

Court: Court of Appeals of New York

Counsel for petitioner: Kimerling,Kenneth

Counsel for respondent: Hynes,Charles J., Weinstein,Peter A.

Entry	Date	Note	Proceedings and Orders
1	May 23 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 27 1990		DISTRIBUTED. September 24, 1990
4	Jun 28 1990	X	Brief of respondent New York in opposition filed.
8	Sep 28 1990		REDISTRIBUTED. October 5, 1990
10	Oct 9 1990		Petition GRANTED. limited to the following questions: 1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable "race neutral" explanation under Batson v. Kentucky, 476 U. S. 79 (1986)? 2. Where a trial court has accepted the prosecutor's proffered explanation as being race neutral, what standard of review is to be applied by reviewing courts? Justice Souter OUT. **********
16	Nov 5 1990		Joint appendix filed.
12	Nov 14 1990		Order extending time to file brief of petitioner on the merits until November 28, 1990.
13	Nov 23 1990		Record filed.
		*	one vol., Appellate Division, Supreme Court of NY, 2nd Judicial Department.
14	Nov 28 1990		Brief of petitioner Hernandez filed.
15	Nov 28 1990		Brief amici curiae of Mexican American Legal Defense, et al. filed.
18	Dec 12 1990		Order extending time to file brief of respondent on the merits until January 7, 1991.
19	Dec 17 1990		SET FOR ARGUMENT MONDAY, FEBRUARY 25, 1991. (2ND CASE)
20	Jan 4 1991	D	Motion of U. S. English, Inc., et al. for leave to file a brief as amici curiae filed.
21	Jan 7 1991		Brief of respondent New York filed.
22	Jan 9 1991		CIRCULATED.
23	Jan 22 1991		Motion of U. S. English, Inc., et al. for leave to file a brief as amici curiae DENIED.
24	Feb 6 1991	X	Reply brief of petitioner Hernandez filed.
26	Feb 15 1991		Record filed.
		*	Court of Appeals of NY-one volume.
27	Feb 25 1991		ARGUED.

EDITOR'S NOTE

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ORIGINAL

89-7645

NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DIONISIO HERNANDEZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE NEW YORK STATE COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether the exclusion of Latino jurors from a petit jury through the use of peremptory challenges because of their ability to understand in Spanish proposed Spanish language testimony violates the Equal Protection Clause of the Fourteenth Amendment?

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TO THE NEW YORK STATE COURT OR APPEALS

OPINIONS BELOW

The opinion of the New York State Court of Appeals is not yet reported; the slip opinion is attached in the Appendix at A1. The opinion of the New York State Appellate Division is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dept. 1986) and is attached in the Appendix at A23. The opinion of the New York State Supreme Court is not reported, and the transcript of the oral decision is attached in the Appendix at A25.

JURISDICTION

The decision of the New York State of Appeals was rendered on February 22, 1990. The jurisdiction of the this Court is invoked pursuant to 28 U.S.C. §1257(a) and Rule 13.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part:

> ..[N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Dionisio Hernandez was charged in a New York State criminal proceeding with attempted murder, assault and criminal possession of a weapon. The charges arose out of incident in which it was alleged that petitioner attempted to kill his girlfriend, soon-to-be wife, and her mother. Two patrons of a restaurant were also wounded in the incident.

Jury selection took place on November 3 - 7, 1986. There was no transcript maintained of the voir dire examination. On November 6, 1986, after the examination of sixty-three jurors had been completed and nine jurors had been selected, defense counsel objected to the prosecution excluding all potential Latino jurors through the exercise of peremptory challenges. A26. In explaining his reasons for the exercise of four of his peremptory challenges, the prosecutor stated as to two of the Latino jurors:

> We talked to them for a long time: the Court talked to them, I talked to them. I believe that in their heart they will try to follow [the interpreter's translation], but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation

> of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have undue influence.

A27. The prosecutor explained that the other two Latinos had family members that had been or would be prosecuted by his office. The trial judge made no specific finding that the proffered explanations were neutral but denied the defendant's motion. A38. The empaneled jury included no Latinos.

Following a trial, the judge dismissed the assault charges involving the two men in the restaurant. The jury returned a guilty verdict on all counts submitted on the charges of attempted murder and criminal possession of a weapon.

On appeal, the New York State Appellate Division held that the defendant had made out a prima facie case of discrimination, but that the prosecutor had stated nondiscriminatory reasons for his challenges. A24. It affirmed the conviction.

The New York State Court of Appeals also affirmed by a divided court. The majority opinion, joined by four judges, found that there was a prima facie case of discrimination. However, it found, under Batson v. Kentucky, 476 U.S. 79 (1986), that the prosecutor had stated a nondiscriminatory reason for the challenges to the Latino jurors. It held that: "Hesitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges." A9.

One judge, in a concurring opinion, invited the New York State legislature to consider eliminating or limiting the use of peremptory challenges.

Two judges in dissent urged a reversal of the conviction. They found that an explanation by a prosecutor that has a disparate impact on members of the defendant's racial or ethnic group is inherently suspect. They found, further, that there was insufficient basis in the record to support a finding that the prosecutor's explanation for the challenges was a neutral one. Both jurors had satisfied the trial court that they would accept the official court translation. Therefore, contrary to assertion of the majority opinion, the case was not really about whether the jurors would "decide the case on the official evidence before them." Moreover, there was no evidence that the prosecutor had sought to determine whether non-Latino jurors also spoke Spanish. The dissent stated that in this case requires heightened scrutiny and that the trial court should have made further inquiries of the prosecutor to support the peremptory challenges.

> Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subject to enhanced scrutiny....Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily by justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of juries of permitting such language-based justifications without close inspection would be intolerable.

A20

REASONS FOR GRANTING CERTIORARI

NEW YORK'S HIGHEST COURT HAS RULED THAT PEREMPTORY CHALLENGES MAY BE USED TO EXCLUDE LATINOS FROM ALL JURIES IN WHICH THERE IS TO BE SPANISH LANGUAGE TESTIMONY, IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT AND INCONSISTENT WITH THE DECISIONS OF THE OTHER STATE AND FEDERAL COURTS

This Court in Batson v. Kentucky, 476 U.S. 79 (1986) applied the Equal Protection Clause of the Fourteenth Amendment to the use of peremptory challenges in criminal cases. It found that a pattern of challenges excluding jurors of the race or ethnicity of the defendant may create an inference of discrimination by the prosecutor. In which case, a prosecutor "must articulate a neutral explanation [for challenging the jurors] related to the particular case to be tried." Id. 476 U.S. at 98 (footnote omitted). The Court recognized that race-based explanations were not "neutral" as a matter of law: "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race." Id. at 97 (citations omitted). Here, as a matter of law, the prosecutor proffered a reason that was neither "neutral" nor an "explanation."

The reason provided by the prosecutor for challenging two Latino jurors was tied to their Spanish language ability and thus to an integral part of their ethnicity. See, Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926); Olagues v. Russionello, 797 F.2d 1511, 1520-21 (9th Cir. 1986), vacated as moot, 484 U.S. 806

(1987); and see e.g. 42 U.S.C. §1973aa-1a (providing voting rights protection to "language minorities"); 29 CFR 1606.6 (prohibiting ethnic origin discrimination in employment based on language).[1] Language cannot serve as a neutral basis anymore than an explanation based on race or color. See, United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989)(en banc). The prosecutor stated that his reason for excluding the jurors was that he did not believe that the two jurors "would be able to listen and follow the interpreter." A26. Both jurors, in response to questions from the court and prosecutor, stated that they would accept the official translation of the interpreter. A31. The prosecutor stated that he did not believe them. A27. Every Spanish speaking juror could be removed through peremptory challenges for the same reason.

The prosecutor claimed that his belief that the jurors were unable or unwilling to follow the interpreter was based on their hesitancy in responding to questions about the translations from Spanish. A27. But the hesitancy evidenced in these two jurors does not distinguish them in any way. A similar hesitancy would be found in all other Spanish speaking jurors. Questions about following an interpreter's translation invariably lead to hesitant responses. Inquiries about the ability to follow an interpreter require a juror to mentally go through a perplexing analysis while

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[1] In Brooklyn (Kings County, New York) where the trial in this matter took place approximately 96% of all Latinos 5 years old and older spoke Spanish in the home. See, 1980 Census Population: General Social and Economic Characteristics, Vol. 34 (N.Y.) at tables 51 and 172.

the prosecutor is waiting for a response. In essence, a juror is asked, "If the witness says in Spanish 'negro' and the interpreter translates that to be 'white,' can you disregard what you heard with your own ears in the court?" Everyone would have some hesitancy in understanding and responding to questions of that type. Indeed, not one, but both jurors that were challenged here evidenced that same hesitancy. Even where there is no "black/white" discrepancy between the testimony and the translation, Spanish fluent jurors will hear and understand the Spanish testimony before it is translated. Their understanding of the testimony is necessarily going to be influenced by what they heard in Spanish. Any hesitancy by prospective jurors in saying that they will disregard what they heard in Spanish is only natural and part and parcel of Spanish speaking ability.[2] The prosecutor's reference to the jurors' hesitancy expressed in words like "I will try" or by body language[3] does not make the his explanation for the peremptory challanges a neutral one, but confirms that it is based on Spanish language ability.

As a matter of law, the prosecutor's explanation would not

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[2] This Court has recognized that certain questions necessarily and appropriately lead to hesitant responses. Adams v. Texas, 448 U.S. 38, 49-51 (1980); see similarly, People v. Turner, 42 Cal.3d 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986).

[3] The prosecutor claimed that these jurors avoided eye contact with him. A27. However, Latinos often out of respect avert their eyes. See, Final Report of the New Jersey Supreme Court Task Force on Interpreter Translation Services, Equal Access to the Courts for Linguistic Minorities, (May 22, 1985) at 33.

have been considered race neutral explanation if he stated that he challenged the Latino jurors because they spoke Spanish. Spanish language fluency is integrally related to ethnicity.[4] Reference to the fact these same jurors were somewhat hesitant in answering questions about the official interpretation does not neutralize the prosecutor's explanation. That hesitancy is integrally related to Spanish language ability and thus ethnicity. One necessarily follows the other. The prosecutor's explanation, as a matter of law, was race-based and not neutral.[5]

In other cases in which a prosecutor has stated that race was a factor in his judgment about exercising a peremptory challenge, the courts have found a per se violation of the Equal Protection Clause. In United States v. Wilson, supra, the prosecutor testified that a black juror who was peremptorily challenged lived

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[4] The majority opinion below accepted this a fortiori connection between a language and ethnicity, but failed to decide the case on that basis. A6-7. But see, State v. Pemberthy, 224 N.J.Super. 280, 540 A.2d 227 (N.J. Super. A.D.), appeal denied, 111 N.J. 633, 546 A.2d 547 (1988), where a New Jersey appellate court accepts a prosecutor's peremptory challenges of Latino and non-Latino jurors based on Spanish language ability where a major issue in the case was the accuracy of translations of out-of-court statements by the defendants. Both parties were offering expert testimony on the translation.

[5] If the prosecutor's true concern was that the jurors would hear and translate the Spanish language testimony differently than the translator, there is clearly a less discriminatory alternative to removing all Latino jurors. See, Albemarle Paper Company v. Moody, 422 U.S. 405, 425 (1975). The judge could instruct jurors that if they did not agree with a translation, they could pass a note to the court to seek a clarification. See, United States v. Perez, 658 F.2d 654, 662-663 (9th Cir. 1981); Santana v. New York City Transit Authority, 132 Misc.2d 777, 505 N.Y.S.2d 775 (Sup. Ct. N.Y. Co. 1986).

in the same town as the defendant, who was also black. He argued that the juror would be influenced by the defendant or contacted by his friends. He said that a white juror from the same town would be less likely to be influenced or contacted because of race. He testified that race is "like being a member of a lodge." Id. 884 F.2d at 1124. The Eighth Circuit found that the explanation was not race neutral. The same result was reached in decisions by the highest courts in Indiana, Florida and California. In all three cases, prosecutors peremptorily challenged black jurors because of their concern that black jurors would respond negatively to prosecution witnesses who had made racially offensive remarks. The courts found that these race-based reasons failed to satisfy the requirement of neutrality. Minniefield v. State, 539 N.E.2d 464 (Ind. Sup. Ct. 1989): State v. Slappy, 552 So.2d 18 (Fla. Sup. Ct.), cert. denied, __ U.S.__, 101 :/Ed/2d 909 (1988); People v. Johnson, 22 Cal.3d 296, 148 Cal.Reptr. 915, 583 P.2d 774 (1978). The decision of the New York Court of Appeals is inconsistent with these decisions. An explanation that includes race and ethnicity cannot be neutral as a matter of law.

It is incumbent on this Court to respond to these post--Batson inconsistent interpretations of the requirements of the Fourteenth Amendment. Petitioner is not asking the Court to make a fact-based determination about discrimination. Rather, petitioner seeks a decision by this Court that directs all courts to reject, as a matter of law, explanations by prosecutors which are based in part on race and ethnicity. Prosecutors should not be allowed to avoid

the limitations of the Equal Protection Clause by relying on integral parts of race and ethnicity, such as language and culture. The dissent below correctly foresees that decisions like this one will inevitably lead to the exclusion of all language minorities from trials in which there will be non-English testimony.

Furthermore, there is even more reason for concern here than in the cases cited above. For here, the explanation provided by the prosecutor was in fact no explanation at all. Peremptory challenges are used by the prosecutor to eliminate jurors who may be biased in favor of the defendant or against the prosecution. The prosecutor seeks a jury free of such bias. As this Court recognized in Batson, "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976), mandamus granted sub nom. United States v. Newman, 549 F.2d 240 (CA2 1977)..." Batson, 476 U.S. at 89 [emphasis added]. Similarly, the Second Circuit stated in a case leading to the Batson decision, that "[t]here are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable." McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), cert. denied, 478 U.S. 1001 (1986) (cited in Batson, 476 U.S. at 98 n.20). See, similarly, Swain v. Alabama, 380 U.S. 202, 220-221 (1965). What is singular and significant about the explanation

here is the absence of any indication of the prosecutor's view of how the challenges relate to the "outcome of the case" or more simply, what bias, however slight, do these jurors have. In Wilson, Minniefield, Slappy, and Johnson, at least the prosecutors' reliance on race was tied to potential juror bias. Here, the explanation is void of any of claims of bias. The prosecutor did not offer a speculative or intuitive judgment that these jurors fell into a non-racial or non-ethnic class of persons that would be anti-prosecution or pro-defendant.[6]

Thus, this is not even a case where hunches, even those based on the tone of voice, body language or signs of indifference, might support a belief about the potential for bias by the juror. There is nothing in the ability to speak Spanish, other than ethnic origin, that indicates a bias or prejudice by the juror. All jurors who speak and understand Spanish are subject to peremptory challenges because they can understand the Spanish language testimony better than the other jurors who only hear the English translation; not because the translation may be inaccurate, but because there is fuller understanding of what is said when it is

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[6] The explanations for the other two Latino jurors that were peremptorily challenged were distinctly different. In both, the prosecutor pointed to specific facts that might demonstrate an anti-prosecutor bias. "...Mr. Munoz, his brother is being prosecuted by our office. His brother had a violation of probation. I don't think we went into any detail on the underlying crime, but I thought that as I questioned him on that, there might be some prejudice." A30. "I believe that I even questioned - challenged her [Ms. Rivera] for cause, but I do know that her brother was arrested for gun possession, he's doing five years probation at this time." A31.

heard in Spanish.[7] However, Latino jurors cannot be stricken because other jurors might be influenced by them. The whole purpose of Batson is to allow a defendant the opportunity to be tried by persons of his own race and ethnicity. Here, where there was an allegation of a crime of passion between a man and his wife-to-be, a prosecutor cannot challenge Latino jurors because of his concern that their cultural comprehension of concepts of "machismo" may influence the other jurors. Neither should he be allowed to challenge Latino jurors whose understanding of Spanish may influence other jurors. Culture and language are integral parts of Latino ethnicity, and a prosecutor's explanations based on culture or language cannot be considered race neutral. Peremptory challenges based on language and culture presume that Latino jurors

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[7] As the New York State Supreme Court stated in Santana:

> In any trial where an interpreter's services are required, the party/witness, at the outset, is placed at a disadvantage. Much of the impact and demeanor of the party/witness becomes obscured by the presence of an interpreter. The jury's attention tends to become transfixed on the interpreter, an unexpressive participant in the trial.
>
> English is a very expansive and expressive language and an interpreter may at times have to make a choice between two or more words which are similar in definition. An interpreter tries not to put words in the most emphatic way unless absolutely required. Inevitably, due to the spontaneity of the interpreter's translation of a word, it is possible that the interpreter may not choose the best word possible, thus causing a deviation in the intended communication to the jury. However, the use of specific word can have a significant impact on what is being communicated.

Id. 505 N.Y.S.2d at 779. Santana involved a tort action in which a Spanish word could be interpreted either as a crash or a bump.

will favor Latino defendants. This is an impermissible assumption under Batson.

Batson holds that the explanation of the prosecutor must be "related to the case to be tried." Id. at 98. The prosecutor here offered no explanation that the challenged jurors might be prejudiced toward the prosecution. California and Florida accepted challenges to the use of race-based peremptories under their state constitution's prior to Batson. After Batson they continued to require that the prosecutor's explanation include information about the individual or specific bias, however slight, of challenged the juror. Slappy (relying on the earlier decision in State v. Neil, 457 So.2d 481 (Fla. Sup. Ct. 1984)); People v. Turner, 42 Cal.3d 718, 230 Cal.Rptr. 651, 726 P.2d 102 (1986) (relying on the earlier decision in People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)); and see similarly, State v. Gilmore, 103 N.J. 508, 511 A.2d 1150, 1166 (1986); Commonwealth v. Soares, 387 N.E.2d 499, 514 (Mass. Sup. Ct.), cert. denied, 444 U.S. 881 (1979). The seminal decision in Wheeler directed the lower courts to require prosecutors to explain their challenges in terms of the "specific bias on the part of the individual juror." Id. at 22 Cal.3d at 284, fn. 32. The review of proffered explanations in all these states revolves around whether the juror actually exhibits the "specific bias" articulated by the prosecutor and whether other jurors who were not challenged exhibit the same specific bias. For example, where a prosecutor in a drug case explains that he seeks to exclude young persons from the jury, because he believes

the young have more sympathy for defendants in drug cases and that older jurors are better in such cases, a trial court will consider if an excluded Latino juror was young and whether other young jurors who were not Latino were also excluded. See, e.g. People v. Trevino, 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719 (1985). The acceptance of even a neutral explanation that has no relationship to the case to be tried makes Batson a meaningless precedent.

New York's lack of inquiry stands in stark contrast to the practice in California and Florida. The unquestioned acceptance of the prosecution's explanation by the New York courts opens up an enormous hole in the Fourteenth Amendment. The trial court made no attempt to probe the prosecutor's explanation for the peremptory challenges. If this case had arisen in California, the prosecutor would have had to state the "specific bias" of the challenged jurors.[8] It would then have been evident that the prosecutor was concerned about having Latino jurors judge a Latino defendant in a case involving a crime of passion. Not only did the trial judge not probe the prosecutor, he made no specific findings about the neutrality of the prosecutor's explanation and whether non-Latinos were also questioned about their language ability. Nevertheless, the New York appellate courts affirmed the denial of the Batson

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[8] The Supreme Courts of at least two states, Nevada and California, have found that hesitation while facially neutral does not constitute a specific bias related to the case. Trevino, 39 Cal.3d at 692 & n.25; Clem v. State, 760 P.2d 103, 105 n.2 (Nev. Sup. Ct. 1988).

motion as if it were based on such findings.[9]

This Court has once sought to address the standards of scrutiny to be applied when neutral explanations had been offered without any apparent connection to a specific bias of the challenged jurors. Tompkins v. Texas, 490 U.S. __, 104 L.Ed.2d 834 (1989). This case presents a further opportunity to establish such standards, not only where the explanations have no apparent connection with a specific bias of a juror, but an explanation that is language-based and, thus, integrally tied to ethnicity. New York's practice is inconsistent with states like Florida and California.

Latino jurors can now be excluded from all juries where there is a possibility of a witness testifying in Spanish on the pretext that the prosecution does not believe that the jurors will be able to follow the interpreter's translation. If these language-based non-explanations "were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" Batson, 476 U.S. at 98, quoting Norris v. Alabama, 294 U.S. 587, 579 (1935).

[9] The majority opinion below compounds this error. It quotes from the trial court's reiteration of the prosecutor's explanation and treats it as if it were a finding of fact by the court. Compare A4 with A35 and A38.

CONCLUSION

The decision by the New York State Court of Appeals threatens the rights of all Latino defendants to equal protection of the law. The rights provided by the Batson decision are effectively denied to Latino defendants and jurors anytime there is a possibility that the trial may include testimony in Spanish. This decision in New York must be brought in line with other decisions by the circuit courts and the highest state courts which have found violations of Equal Protection Clause whenever prosecutors directly rely on race and ethnicity as part of their explanations for peremptory challenges. Furthermore, this Court must address the diverse opinions on the appropriate standards to apply in evaluating explanations that point to no apparent case-outcome bias exhibited by the challenged jurors. This case presents an appropriate opportunity to spell out the contours of the Batson decision.

Wherefore, petitioner respectfully requests that this Court grant his petition for writ of certiorari.

DATED: May 23, 1990

Respectfully submitted,

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APPENDIX

State of New York
Court of Appeals

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2 No. 10
The People &c.,
Respondent,
v.
Dionisio Hernandez,
Appellant.

OPINION

Robert M. Pitler, Daniel E. Rosenfeld, Brooklyn, for appellant.

Elizabeth Holtzman, DA, Kings County (Carol Teague Schwartzkopf, Barbara D. Underwood of counsel) for respondent.

BELLACOSA, J.:

Defendant's essential argument attacks the judgment of conviction as having been secured in violation of his equal protection rights because, as he asserts, the prosecution discriminatorily exercised its peremptory challenges to exclude two Latino persons from the jury that ultimately found him guilty of two counts each of attempted murder and criminal possession of a weapon (see, Batson v Kentucky, 476 US 79). Defendant, also a

Latino, satisfied the Batson (476 US 79, supra) threshold predicate of discriminatory use of peremptory challenges by the prosecutor's rejection of all the Latino prospective jurors.

The dispositive issue -- circumscribed in this case by pertinent undisturbed factual findings -- is whether the prosecution can be said to have failed to satisfy its burden, in turn, to come forward with a neutral explanation for its eschewal of those prospective jurors so as to refute the inference of purposeful discrimination. The two prospective jurors at issue, who were fluent in Spanish, indicated, according to the prosecutor's articulated belief, that they would only try to respect as authoritative the official court interpreter's translation of evidence given by Spanish-speaking witnesses. This prosecutorial assertion, sufficiently documented by the record and supported in the findings of the two lower courts, warrants our concluding that the prosecutor fulfilled his burden of coming forward with a satisfactory explanation that the peremptory strikes in this case were neutral and nondiscriminatory. We thus affirm the order of the Appellate Division which had affirmed the conviction.

The conviction, after a jury trial, arose out of a shooting in which defendant had attempted to kill his young woman friend and her mother as they left a restaurant in Brooklyn. During the incident, random shots from defendant's gun struck and wounded two other patrons of the restaurant.

Prior to trial and after the voir dire examination of sixty-three jurors had been completed and nine jurors had been

selected, defense counsel objected to the prosecutor's use of peremptory challenges excusing four potential jurors with Latino surnames. Over the course of an extensive record colloquy, defense counsel objected repeatedly that the prosecutor had removed every Latino from the venire and moved for a mistrial.

The Assistant District Attorney responded that he had challenged two of the jurors, Munoz and Rivera, because each had a brother who had been prosecuted by the same District Attorney's office and that in his opinion these jurors could not be fair in their deliberations on the case. The prosecutor further explained that he had challenged the other two jurors, Mikus and Gonzalez -- the only jurors pertinent to the disposition of the issue before us -- because each had given him a basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses. Among selected expressions made during the colloquy, the prosecutor proffered this summary for the record:

> Assistant District Attorney: Your Honor, my reason for rejecting the -- these two jurors -- I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter * * * * We talked to them for a long time; the court talked to them; I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what

> was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact on the jury (Apdx, at 23-24 [emphasis added]; see also, Apdx, at 26-28, 29).

The Trial Court then denied defendant's mistrial motion, stating:

> The Court: Therefore, he [Assistant District Attorney] didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize, he said I have grave doubts, and that's why I'm asking. (Apdx, at 32 [emphasis added]).

The case was tried with no Latinos on the jury and defendant was convicted. The Appellate Division affirmed the judgment of conviction and a Judge of this Court granted leave to appeal.

New York's Criminal Procedure Law provides a method for both the prosecution and defense counsel to challenge for cause the selection of a potential juror if it can be shown that bias may prevent that juror from deciding the case impartially (CPL 270.20). Additionally, a limited number of peremptory challenges -- because counsel may intuit a bias that is not documentarily demonstrable sufficient for a challenge for cause -- are allowed to exclude jurors usually without any explanation (CPL 270.25).

The 1986 rule in Batson v Kentucky (476 US 79, supra) added restrictions to the exercise by prosecutors of their peremptory challenges against members of a defendant's racial class. It abandoned the prosecutorially-weighted evidentiary tilt of Swain v Alabama (380 US 202) and imposed a new and important calculus. To succeed initially in erecting the presumption of purposeful discrimination, the defendant must demonstrate (1) membership in a "cognizable racial group"; (2) the exercise of peremptory challenges by the prosecutor to exclude members of the defendant's group; and (3) "facts and any other relevant circumstances rais[ing] an inference" of a discriminatory purpose (Batson v Kentucky, supra, at 96).

At that point the burden shifts to the prosecution to come forward and overcome the attribution and inference of purposeful discrimination with an articulable neutral explanation for having excused those jurors. The prosecutor's explanation need not rise to the level for sustaining a challenge for cause. On the other hand, the prosecutor cannot simply state that rejecting the jurors rested on the assumption they might be favorably disposed to the defendant because of shared race or ethnic similarities. While the prosecutor has this burden of coming forward, "the ultimate burden of persuasion" must be carried by the person alleging the intentional discrimination (Batson v Kentucky, supra, at 94, n 18). By these respective weights, Batson calibrates the test and burdens while supplying a potent and appropriate remedy against invidious petit jury discrimination.

In People v Scott (70 NY2d 420), we applied the Batson rule retroactively under Griffith v Kentucky (479 US 314). Defendant, a black woman, was charged with murdering and robbing a white man. There were five black prospective jurors in the venire and the prosecutor excused them all peremptorily. We held that the prosecutor's "'pattern' of strikes" gave rise to an inference of discrimination satisfying defendant's lighter burden (People v Scott, supra, at 425-426). We reversed without having to address in that case the issue of what constitutes a neutral explanation under Batson.

Here, no one challenges the triggering of Batson's threshold. The exercise of prosecutorial peremptory challenges to exclude the only Latino jurors in the prosecution of a Latino defendant is enough (Batson v Kentucky, 476 US 79, supra, at 96-97; People v Scott, 70 NY2d 420, supra). The only new issue, circumscribed here by pertinent undisturbed factual findings, is whether the prosecution responded with a satisfactory nondiscriminatory explanation for excluding the only Latino jurors. Defendant contends as a matter of law that the burden has not been met because the Latino origins and the Spanish language are so inextricably intertwined that an exclusion of Latinos on the basis of language is inescapably, almost irrefutably, an exclusion on forbidden ethnic or racial grounds.

These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony. So it cannot be,

as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic identity factor alone determines this case.

Rather, the prosecutor's belief was that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court. That is a legitimate neutral ground for exercising a peremptory challenge, and it was for the Trial Court to determine if the prosecutor's explanation was pretextual or real and justified by the answers and conduct of the two jurors during voir dire. Indeed, the Supreme Court itself recognized that resolution of these issues springing from the Batson test were rightly reposed in fact-finding courts entitled to "great deference" with customary appellate oversight (Batson v Kentucky, 476 US 79, supra, at 97-98). That reasonable minds could disagree at this level of review on this record demonstrates the wisdom and propriety of the Supreme Court's and our view that, in the distribution of judicial functions among courts, deference generally to the fact-finding and evidence-viewing court is warranted in these circumstances. The Trial Court accepted the prosecutor's explanation, as did the Appellate Division, and we have no basis in law or policy to conclude that those courts erred in these essentially factual determinations.

Indeed, the prosecution documented its belief on the jurors' statements and on doubt-raising body language descriptions (e.g., averted eyes and gazes on being questioned on the critical points) developed during an extensive voir dire and

placed on the record before the Trial Justice, who was also present at the entire voir dire. The record-based beliefs, advanced to satisfy its Batson-based burden, do not appear to us as a matter of law and did not appear to the lower courts as a matter of fact to be some facial facade. If the court was not satisfied with the adequacy of this explanation after watching and listening to the proceedings, of course it could have conducted a further voir dire; but under the circumstances presented here, that was a matter within the Trial Court's discretion.

The burden, moreover, does not require the prosecution, as the dissenting opinion would, to come forward with reasons rising, in effect and function, to a sustainable challenge for cause, for that would extend Batson and Scott, not apply them. Justice Powell's Opinion for the Supreme Court in Batson is the primary source of guidance and development, and it is carefully modulated to require that the prosecution must show only a neutral record-based belief for exercising a now properly circumscribed statutory right of peremptory excusal of jurors. To bear a proper and balanced burden of coming forward with a neutral explanation of a peremptory excusal of a juror is one thing; to create a new, higher burden of disproving, under "enhanced scrutiny" and the "inherently suspect" classification, a subjective, even "unconscious," state of mind is quite something else. This would be practically and legally speaking an impossible and ultimate burden of proof, not the lesser burden of coming forward with a justifiable explanation. Indeed, this

rule would not just circumscribe the exercise of a peremptory challenge by the People; it would change its very nature because the People would have to prove cause for removal as to the juror and absolute purity as to themselves.

In sum, we view quite straightforwardly the essence of this case as being really about a prosecutor's court-accepted explanation concerning the ability of these jurors -- or any sworn jurors no matter their race or ethnic similarities -- to decide a case on the official evidence before them, not on their own personal expertise or language proficiency (compare, People v Legister, ___ NY2d ___ [slip opn, 2-8-90]). Hesitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges. The findings here of a legitimately articulated reason rooted in principles of jury selection, responsibility and function are valid and supportable in this record.

It is important to emphasize, however, that pretextual maneuvering or less verifiable manifestations of jurors' attitudes about adhering to governing instructions will not satisfy the prosecution's burden. Thus, our holding in no way diminishes the apodictic policy and precedents at issue, which we unequivocally reaffirm.

Our analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right, as no justification for breaking

new ground as to this clause by differentiating between this dually-protected constitutional right is sufficiently advanced (see, Under 21 v City of New York, 65 NY2d 344, 360; Matter of Esler v Walters, 56 NY2d 306, 313-314).

Defendant's remaining contentions of evidentiary trial errors involving impeachment, bolstering and cross examination are unavailing, because in the circumstances of this case these matters were within the range of the Trial Court's discretion.

There being no equal protection violation or any other error warranting disturbing the actions of the courts below, the order of the Appellate Division should be affirmed.

People v Dioniso Hernandez
Case No. 10

Titone, J. (concurring):

I am in complete agreement with and wholeheartedly join in the majority opinion by Judge Bellacosa. In addition, the posture in which the Batson question is presented here prompts me to set forth my own, strongly held beliefs on the subject of post-Batson peremptory challenges.

In his concurrence in Batson (476 US, at 102-108), Justice Marshall made the observation that the potential for racial discrimination is inherent in the very notion of a system of juror challenges that need not be explained. He further noted that a prosecutor's seemingly neutral verbiage explaining his use of peremptories can easily mask an underlying racist animus, whether conscious or unconscious, adding another layer of complexity to the trial court's task of assessing the propriety of the proffered explanation.

Justice Marshall's comments highlight for me the very profound difficulties involved in administering a juror challenge system that is theoretically based on the attorney's inexplicable personal hunch with a constitutional rule that requires attorneys

to offer satisfactory "neutral" explanations for their choices. The mandated inquiry, as it is conceived in both the majority and the dissenting opinions, entails an analysis that looks beyond the prosecutor's stated explanation in certain instances, and considers the prosecutor's subjective motivations and state of mind. The inquiry thus renders what was originally to be a matter of unexplained choice into an exploration that is in some respects more complex, and certainly more intrusive, than the objective inquiry involved in resolving juror challenges for cause. Moreover, because, as the dissenter notes, racist motives are easily concealed, there is no assurance that even an in-depth inquiry will be effective in eradicating racial bias in the jury selection process.

The Supreme Court's decision in Batson was a welcome, necessary and important judicial statement that racial bias and racist motivations have no place in our American courtrooms. In the final analysis, however, the most significant development to come out of Batson may well lie in Justice Marshall's observation that "only by banning peremptories entirely can such discrimination be eliminated" (476 US, at 107-108). Even Batson, as Justice Marshall noted, permits a degree of discrimination by establishing a threshold test for a prima facie case that tolerates some number of unexplained ethnically targeted challenges (476 US, at 105 ["prosecutors are left free to discriminate * * * provided that they hold that discrimination to an "acceptable level"]. Manifestly, an institution that furnishes the opportunity for racial discrimination, at any

level, is -- and will continue to be -- highly problematic in a society that has grown increasingly intolerant of judgments made on the basis of stereotyping in any form.

At this point in the evolution of this legal issue, I suspect that rather than developing a complex set of judicially imposed limitations and standards, the most constructive course would be for the Legislature to take a hard look at the existing peremptory system with a view toward determining whether it is still viable, at least as it is presently constituted.* Whether or not Justice Marshall was correct in his assumption that the historic institution of peremptory challenges simply cannot be purged of its potential for discriminatory practices, it has become increasingly clear that judicial efforts to accomplish that goal can lead only to new layers of inquiry and complex tests that are fundamentally incompatible with the institution's basic premise (see, People v McCray, 57 NY2d 542, 545-549). While such efforts can and must continue to be made, it seems to me that the time is fast approaching for the Legislature to rethink its policy choices in this highly sensitive area of law.

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*It may well be that a system with a drastically reduced number of peremptories for each side would adequately serve the essential purpose of permitting some unexplained juror challenges (see, People v McCray, 57 NY2d 542, 547-549), while at the same time minimizing the opportunity for and incentives to engage in purposeful discrimination.

People v Hernandez
No. 10

KAYE, J. (dissenting):

The special importance of this appeal is that it calls upon us, for the first time, to spell out the People's burden once a defendant has established a prima facie case of discrimination in the exercise of peremptory challenges. The United States Supreme Court has not yet been required to do that; nor has our only other opinion on point--People v Scott (70 NY2d 420). By this case we thus set a course for the future in this State, marking out the tolerable limits for the People's exercise of peremptory challenges.

The course we now set, I believe, diminishes the declared principle that peremptory challenges cannot be used to discriminate against racial or ethnic groups. As Justice Marshall cautioned in Batson, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror." (476 US at 106.) If that is all that is required, the majority's decision proves

his point that there is indeed little real protection in defendant's newly-recognized equal protection right. I therefore respectfully dissent.

Preliminarily, this case should be decided as a matter of state law, rather than federal law (majority opn, p 11).

Issues involving the proper exercise of peremptory challenges are especially suited to resolution as a matter of state law at this time. As Justice White made clear in his Batson concurrence, "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid." (476 US at 102.) In a matter of such day-to-day vital importance locally, the citizens of this State would be well served by the development of an authoritative body of state law instead of being held in suspense, case-by-case, over the next decade of litigation while the United States Supreme Court fleshes out the newly-recognized minimum equal protection right that will prevail across the nation. Several other state courts do exactly this. Indeed, the independent development of state law concerning peremptory challenges has proved particularly beneficial nationally as well as locally. It was, after all, state courts independently construing their state constitutions that ultimately led the Supreme Court in Batson to abandon Swain v Alabama (380 US 202) and follow "the lead of number of state courts construing their state's constitution." (See, Batson v Kentucky, supra, at 82 n 1.)

Moreover, it cannot be assumed that state law would proceed in lockstep with federal law as the federal law on this issue emerges. While this Court in People v McCray (57 NY2d 542, cert denied 461 US 961) declined to read the state equal protection right differently from then-existing federal law, Batson has effected a very significant change in federal law that might well alter that conclusion. Just such a shift occurred only recently with respect to the exclusionary rule (see, People v P.J. Video, 68 NY2d 296, cert denied 479 US 1091; see also, People v Johnson, 66 NY2d 398, 411 [Titone, J., concurring]).

Thus, I would decide this case as a matter of state law, agreeing with the observation of the New Jersey Supreme Court that the fact "[t]hat the United States Supreme Court has overruled Swain in Batson does not mean that the laboratories operated by leading state courts should now close up shop." (State v Gilmore, 103 NJ 508, 522, 511 A2d 1150, 1157.)

Reaching the merits, if our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this Court in defining and protecting defendants' nascent constitutional right has been virtually surrendered at the outset. While the trial judge's observations of the unfolding events are of course important, there is still a significant role for this Court in clearly articulating the standard and then

determining the law question whether the People have satisfied that standard. That has not been done.

This case differs from other "Batson" cases in a critical respect that is not sufficiently credited by the majority. Here, the prosecutor's "neutral" explanation is one that necessarily produces disparate impact on a single ethnic group. The statistics before us indicate that, in Kings County, virtually all Latinos speak Spanish at home. That this case additionally involves testimony of witnesses in Spanish and an official translator hardly minimizes the potential for disparate impact: we are advised that the state court system employs 113 Spanish translators--presumably rendering accurate translations in court proceedings--who are engaged more than 250 times a day. Accepting as a sufficient explanation that the prosecution will offer the testimony of a witness whose native tongue is Spanish--whether or not an interpreter is required--too easily circumvents the People's obligation and the defendant's right, and allows the prosecutor to do by indirection what can no longer be done directly.

An explanation by a prosecutor that may appear facially neutral but nonetheless has a disparate impact on members of defendant's racial or ethnic group is "inherently suspect." (Serr & Maney, Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of A Delicate Balance, 79 J Crim L & Criminology 1, 54 [1988].) Consequently, a reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be

accepted (see, State v Sleppy, 522 So2d 18 [Fla]; Gamble v State, 257 Ga 325, 357 SE2d 792; State v Gilmore, supra; see also, 2 LaFave & Israel, Criminal Procedure § 21.3 [1989 Pocket Part]). To conclude otherwise can too easily permit discriminatory practices to continue. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective [latino] juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. * * * [P]rosecutor's peremptories are based on their 'seat-of-the-pants instincts.' Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice." (Batson, 476 US at 106 [Marshall, J., concurring].)

Here, there is not a sufficient evidentiary record to support the prosecutor's explanation. Two persons believed to be of "Spanish descent" were excluded because their Spanish language fluency "might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony." (Majority opn, at 7.) The majority skews the issue when it states that this case is really about these jurors' ability "to decide the case on the official evidence before them, not on their own personal expertise or language proficiency" (majority opn, p 10); if that were so they undoubtedly would have been excused for cause. Despite this

Court's repeated reference to the two jurors' initial expressed uncertainty or hesitancy, the fact remains that both individuals satisfied the court that they would accept the official court translation, and that they would be fair and impartial jurors. As the trial judge stated on the record, the two jurors "said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize." Similarly, the prosecutor acknowledged that the jurors' "final answer was they could do it" [i.e., accept the official court translation as final].

While the People emphasize their interest in excluding Spanish-speaking jurors because of the presence of an interpreter, there is no indication that any other members of the panel were also asked if they spoke Spanish. Charged by defense counsel with discriminating against the two, it is significant that in offering his explanation to the trial court the prosecutor made no indication of similar interest about the balance of the panel (cf., State v Antwine, 743 SW2d 51 [Mo], cert denied ____US____, 108 S Ct 1755 [reasons given--inattentiveness during voir dire and relative in prison--were also reasons used to challenge whites]; State v Walton, 227 Neb 559, 418 NW2d 589 [reason given--no ties to community--also used to challenge whites]; see also, LaFave & Israel, op cit.).

Thus, given the potential for disparate impact and the meager record made by the People on the issue, I cannot agree

with the majority that the People have satisfied their burden of rebutting the prima facie case of discrimination in this case.

Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny. The objective of such scrutiny is not to equate peremptories with challenges for cause but to determine whether the proffered ground is indeed an appropriate reason to exclude such groups from the jury at all. Additional voir dire, either directed or conducted by the court, may not always be necessary, but some investigation or inquiry beyond the minimum mandated in the ordinary case is. Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications without close inspection would be intolerable.

In any event, certainly something more is required than the prosecutor's reference to a subjective impression (based on lack of eye contact) of the sincerity of the jurors' assurances that they would accept the interpreter's version of what the witnesses said. All that we know for certain in this case is that defendant is a Latino, and every Latino has been excluded from a panel of 93 individuals. That being so, the inference

remains unrebutted that the trial prosecutor struck the last two Latino jurors on the basis of an intuitive judgment deriving from their heritage. The Supreme Court in Batson concluded that the prosecutor "may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race." (476 US at 97-98.) On this record, we really have no more than that.

Finally, I must question the majority's facile assumption that the explanation offered by the prosecutor was a valid trial-related concern at all. If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish. Surely, the majority does not intend to suggest, on the other hand, that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed. And if the prosecutor's concern is merely that the jurors may become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors. What is not a permissible method of addressing

the situation is the wholesale exclusion from the jury of anyone sharing defendant's racial or ethnic background.

On this record, the removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned. I would reverse the Appellate Division order and order a new trial.

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Order affirmed. Opinion by Judge Bellacosa in which Chief Judge Wachtler and Judges Simons and Titone concur, Judge Titone in a separate opinion. Judge Kaye dissents and votes to reverse in an opinion in which Judge Hancock concurs. Judge Alexander took no part.

Decided February 22, 1990

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saw the complainant, whom he knew, walking alone in the street late at night. It was further established by these witnesses that the defendant walked up to the complainant, pushed and punched him and hit him with a bottle. When the complainant ran away, the defendant shot him in the back from a distance of about 15 feet. Viewing the evidence in the light most favorable to the People (*see, People v. Contes*, 60 N.Y. 2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that the trial testimony was legally sufficient for the jury to find the defendant guilty of the charges upon which he was convicted. The defendant also contends that these witnesses should not have been believed by the jury, since they were involved with illegal drugs. We disagree. The involvement of the witnesses with drugs was a factor to be weighed in gauging their credibility, and resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses (*see, People v. Gaimari*, 176 N.Y. 84, 94, 68 N.E. 112). Its determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (*see, People v. Garafolo*, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500). Upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence (CPL 470.15[5]).

We have reviewed the remaining arguments raised by the defendant and find them to be without merit (*see, People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571, 313 N.E.2d 41, *cert. denied* 419 U.S. 1012, 95 S.Ct. 332, 42 L.Ed.2d 286; *People v. Thomas*, 46 N.Y.2d 100, 105, 412 N.Y.S.2d 845, 385 N.E.2d 584, *appeal dismissed* 444 U.S. 891, 100 S.Ct. 197, 62 L.Ed.2d 127; *People v. Ellis*, 126 A.D.2d 663, 511 N.Y. S.2d 90, *lv. granted* 69 N.Y.2d 949, 516 N.Y.S.2d 1032, 509 N.E.2d 367; *People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 334, 385 N.E.2d 1262).

140 A.D.2d 543

The PEOPLE, etc., Respondent,

v.

Dionisio HERNANDEZ, Appellant.

Supreme Court, Appellate Division, Second Department.

May 16, 1988.

Defendant was convicted in the Supreme Court, Kings County, Beldock, J., of, inter alia, attempted murder, and he appealed. The Supreme Court, Appellate Division, held that prosecutor gave race neutral explanations sufficient to rebut Hispanic defendant's prima facie showing of discrimination in prosecutor's exercise of his peremptory jury strikes.

Affirmed.

1. Jury ⇐33(5.1)

Fact that prosecutor peremptorily challenged the only three prospective jurors who definitely had Hispanic surnames was sufficient to make out prima facie case of discrimination against Hispanic defendant accused of attempted murder.

2. Jury ⇐120

Prosecutor came forward with sufficient, race neutral explanations for his peremptory challenges of prospective jurors with Hispanic surnames where two jurors were dismissed because they had close relatives who had been prosecuted for crimes, and remaining two jurors spoke Spanish and indicated that they might have difficulty accepting court interpreter's translation of testimony as final and authoritative.

Martin Geoffrey Goldberg, Franklin Square, for appellant.

Elizabeth Holtzman, Dist. Atty., Brooklyn (Barbara D. Underwood, Nikki Kowalski and Carol Teague Schwartzkopf, of counsel), for respondent.

Before THOMPSON, J.P., and LAWRENCE, EIBER and BALLETTA, JJ.

MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Beldock, J.), rendered January 30, 1987, convicting him of attempted murder in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

[1, 2] The defendant, who is Hispanic, claims that the prosecutor used his peremptory challenges to exclude from the jury all panel members with Hispanic surnames, thereby violating the defendant's equal protection rights (*see, Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S.2d 94, 516 N.E.2d 1208). Although the ethnicity of one challenged juror is not certain, the record reveals that the prosecutor did in fact peremptorily challenge the only three prospective jurors who definitely had Hispanic surnames. Therefore the defendant has made out a prima facie case of discrimination (*see, Batson v. Kentucky, supra*, 476 U.S. at 96, 106 S.Ct. at 1722; *People v. Scott, supra*, 70 N.Y.2d at 423, 522 N.Y.S.2d 94, 516 N.E.2d 1208). However, as to all the challenged jurors the prosecutor came forward with race neutral explanations for his challenges sufficient to rebut the defendant's prima facie showing (*see, Batson v. Kentucky, supra*, 476 U.S. at 96–97, 106 S.Ct. at 1722–23). Two of the jurors were dismissed because they had close relatives who had been prosecuted by the district attorney's office and there was a question as to their impartiality. The remaining two jurors, including the one whose Hispanic origin was questionable, were challenged because they both spoke Spanish and indicated during the voir dire that they might have difficulty accepting as final and authoritative the court interpreter's translation of the testimony. Although these explanations may not have risen to the level of those needed to justify a challenge for cause, they were sufficient to satisfy the prosecutor's burden to come forward with nondiscriminatory reasons for his challenges (*see, Batson v. Kentucky, supra*, at 97, 106 S.Ct. at 1723; *People v. Baysden*, 128 A.D.2d 795, 513 N.Y.S.2d 495; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 115, 516 N.E.2d 1228; *People v. Cartagena*, 128 A.D.2d 797, 513 N.Y.S.2d 497; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 116, 516 N.E.2d 1229).

140 A.D.2d 545

The PEOPLE, etc., Respondent,

v.

Wilfredo MAISONAVE, Appellant.

Supreme Court, Appellate Division, Second Department.

May 16, 1988.

Defendant was convicted of attempted murder, assault, possession of weapon and reckless endangerment by jury verdict before the Supreme Court, Queens County, Lakritz, J., and defendant appealed. The Supreme Court, Appellate Division, held that: (1) assault defendant was not entitled to second continuance to locate investigating police officer to lay foundation for police officer's report's admission, and (2) defendant had other means by which report could have been admitted.

Affirmed.

1. Criminal Law ⇐614(1)

Assault defendant was not entitled to second continuance during trial while police attempted to locate retired investigating officer, whose reports defendant wished to introduce as evidence of witnesses' prior inconsistent statements, where investigat-

THE CLERK: Let the record reflect that the nine prospective jurors have entered the courtroom and are sitting in the box.

(Whereupon, the selection of the jury continued).

(The following took place in chambers between counsel and the Court):

THE CLERK: First, we're considering jurors sitting in seats two, three and five for seats 10 and 12.

People have any challenges for cause? We're considering the first three seats where there's jurors still sitting. People for cause?

MR. McINTYRE: No.

THE CLERK: Defense?

MR. BLAUSTEIN: None by the defense.

Will the Court note the fact that I'm raising objection to counsel - - to the District Attorney taking Spanish people off the jury. This is already the fourth person of Spanish descent who had a Spanish name that the District Attorney has excluded from the jury, and I think even Elizabeth Holtzman, the District Attorney, several months ago said that she does not favor the practice of

her District Attorneys rejecting blacks or Hispanics or minority people, and she made it very plain. It was on page one of the Law Journal, and I'm going to make an objection here at this time.

MR. McINTYRE: Yes, your Honor, may I respond?

MR. BLAUSTEIN: I'm going to make an objection at this time that he has rejected all the Hispanics, Judge. We have no Hispanics on this jury because of the District Attorney's challenges, either peremptory or for cause.

I'm sorry. They were all peremptory. They weren't for cause. He had no real reason to reject any of them.

MR. McINTYRE: Your Honor, my reason for rejecting the - - these two jurors - - I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

MR. BLAUSTEIN: You mean the engineer couldn't understand?

MR. McINTYRE: Excuse me. I listened to you, Mr. Blaustein. Can you listen to me?

MR. BLAUSTEIN: Go ahead. I'm sorry.

MR. McINTYRE: We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

I see also, since Mr. Blaustein has raised the issue, that Mr. Luis Munoz - - if that's who he's referring to - - was challenged by the People. His brother had been arrested on a violation of probation, and I asked him several questions about that, not specific - - not several questions about

that, but I did ask him about that, and I didn't feel he could be fair to the People with his brother currently being prosecuted by law enforcement in our office.

I don't know of any other Hispanics.

MR. BLAUSTEIN: Do you still think the jury can be fair when we have mothers who have sons who are police officers? Do you think it's fair to put them on a jury?

You picked out the man quickly enough as Munoz as the other Spanish-speaking man.

MR. McINTYRE: Excuse me.

MR. BLAUSTEIN: You mentioned his name. I couldn't even remember his name, but I remember there was one other Spanish boy that you dumped, and I'm going to at this time ask for a mistrial, Judge, based on the fact - - based on the conduct of the District Attorney.

MR. McINTYRE: Your Honor, may I have a moment? I want to call my office.

THE COURT: About?

MR. McINTYRE: I would just like a moment to call my office.

MR. BLAUSTEIN: Can we have a ruling? I'm

moving for a mistrial.

MR. McINTYRE: I may want a supervisor over here.

MR. BLAUSTEIN: What is a supervisor going to do with this case?

MR. McINTYRE: Thank you.

THE COURT: Before I make a ruling.

(Pause in the proceedings).

MR. BLAUSTEIN: Let me renew my motion at this time.

THE COURT: Denied.

MR. McINTYRE: Let me respond also.

MR. BLAUSTEIN: I haven't had a chance to mention the names of the parties.

The District Attorney at this time is rejecting - -

THE COURT: Two jurors.

MR. BLAUSTEIN: (continuing) - - peremptorily Gonzalez, Mico (phonetically), and has rejected heretofore Munoz and Rivera, and I think that shows a pattern here of eliminating Hispanics from the jury, and I therefore move for a mistrial.

MR. McINTYRE: Your Honor, I have to respond just for the record. I do want to say, though,

before I respond on each of the individual jurors, that this case involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are going to be Hispanic. I have absolutely no reason - - there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that. I'm just trying to find Mr. Rodriguez.

As I said about Mr. Munoz, his brother is being prosecuted by our office. His brother had a violation of probation. I don't think we went into any detail on the underlying crime, but I thought that as I questioned him on that, there might be some prejudice.

As I spoke to these last two, that is, her name is not Mico, I think it was Micous (phonetically) - -

MR. BLAUSTEIN: Micous. I'm sorry.

MR. McINTYRE: (continuing) - - his name is Gonzalez, and I questioned him at some length, and I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even

had to ask the Judge to question them on that, and their answers were - - I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.

I'm having trouble finding the notes on Rivera. Do you know what round he was in, Mr. Blaustein?

MR. BLAUSTEIN: It was a she.

THE COURT: She.

THE CLERK: She was sitting in the back row.

MR. BLAUSTEIN: It wasn't a he.

MR. McINTYRE: I believe I even questioned - - challenged her for cause, but I do know that her brother was arrested for gun possession, he's doing five years probation at this time.

In addition to that, she was the one who indicated that she would have a time problem if the case extended, and because of the length of the case and number of witnesses I had, I even questioned about whether or not she would feel the need to hurry up the case. I challenged her for cause, and the Judge denied my challenge for cause. You didn't consent to my challenge for cause.

My reason was I felt that time would be a factor in her decision, and I also felt that the fact that her brother was currently on probation might also influence her decision.

Those are my reasons for the jurors that you have mentioned.

MR. BLAUSTEIN: In other words, you're telling the Court now that if we had four blacks on trial here, that you would eliminate all the blacks from the jury just because you're telling me that because there are four Spanish people involved, that's why you're eliminating four Spanish people?

MR. McINTYRE: I don't understand your logic.

THE COURT: I don't follow you at all there.

MR. McINTYRE: I think that the reasons I've given you have nothing to do with their ethnicity.

MR. BLAUSTEIN: It must be because you said we had four Spanish people involved in this situation and therefore you don't want four Spanish people on the jury. Now if that isn't prejudicial, I don't know what it is.

THE COURT: That's not what he said, Mr. Blaustein. I don't know if you don't know what he says or you don't hear what he says.

What he said was why would he throw off Spanish people when all of his witnesses will be Hispanic people.

MR. BLAUSTEIN: Because he's afraid that there'll be sympathy by Hispanic jurors to Spanish defendants. That's as plain as the nose on my face.

THE COURT: Well, your nose is plain, I grant you that.

MR. McINTYRE: All the victims - - that has nothing to do with it.

THE COURT: The victims are all Hispanics, he said, and, therefore, they will be testifying for the People, so there could be sympathy for them as well as for the defendant, so he said ot would not seem logical in this case he would look to throw off Hispanics, because I don't think that his logic is wrong. They might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter.

MR. BLAUSTEIN: Well, Judge, let me ask you this question. The People have consistently refused to, in my challenges for cause, to reject

people who are relatives - - whose close relatives' sons and brothers are police officers. I mean, where's the logic there? I don't follow him. You mean that if you're Hispanic, you go off the jury, but if your son is a cop, you keep him on because it's very good to keep somebody on a jury whose son is a cop or whose brother is a cop or whose cousin is a cop?

MR. McINTYRE: May I say, Judge, just to respond once again, I don't want to be confused as saying I'm rejecting people who are Hispanic, but in every one of those cases where I didn't consent to your challenge for cause, Mr. Blaustein, those jurors said, when they were questioned by the Judge, that they could be fair.

Now, if you remember, there were a number of jurors who came up and spoke to the Judge, you and me, and who said they had friends who were police officers. It was a gentleman yesterday afternoon who said he had a friend who was a police officer, and he said he couldn't be fair. I consented. I consented to throw him off the jury.

Where a juror has said, however, that they have relatives or friends who are on the police

force and they can be fair, I don't think - -

MR. BLAUSTEIN: Well, number two and number three, who you wanted to reject today, both said in response to his Honor's questions they could be fair and they could render a fair and impartial verdict.

MR. McINTYRE: Accordingly, I don't feel a challenge for cause lies.

THE COURT: Therefore, he didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize, he says I have grave doubts, and that's why I'm asking - -

MR. BLAUSTEIN: Let me point out to the Court at this time that if we are to pick prospective jurors, that we're going to wind up eventually with these two women whose sons are both police officers. They are either going to wind up as jurors or alternates.

What position does that put me in? I only have one peremptory challenge, Judge, and I'm being

short-circuited here very quickly and very cutely by the District Attorney. He knows what he's doing. He's got two women sitting in the back, both got police officer sons. You're going to tell me they're not going to be influenced in any manner if a cop gets on the stand and testifies? You have to be very naive if you think they don't discuss matters with their sons and that they are going to be - - they're not going to bend backwards if they hear sons testifying. That's the only reason for - - I think one of the reasons for getting rid of these two jurors.

We're left here with a very small panel. I'm left with one peremptory. My throat is being cut because eventually there are going to be two women whose sons are cops. I have no choice. I won't be able to challenge them and dump them. What kind of fair trial is my client going to get?

MR. McINTYRE: So, Mr. Blaustein, you're in effect conceding that you have - -

MR. BLAUSTEIN: No. These are the reasons - -

MR. McINTYRE: Can I finish?

You're in fact then saying that there are reasons other than ethnicity for my challenging these

two jurors?

MR. BLAUSTEIN: I'm saying both ethnicity and the fact that you want to swing over to these other two women whose sons are cops.

MR. McINTYRE: As long as you're conceding - -

MR. BLAUSTEIN: We can't possibly get a fair trial if that condition is going to continue here unless we put in 10 new jurors in the box and start with 10 new and pick jurors from there, Judge, and reject the ones we had, which would be the only fair thing to do, because I'm going to get caught here with two women whose sons are cops, they're not going to do me any good anywhere.

THE COURT: Well, Mr. Blaustein, you say that, and I'm satisfied that these jurors could be fair and impartial from what they said.

As a matter of fact, one of these two prospective jurors said her son is now in the 77th, but he wasn't there before, so she recognizes that some policemen do things that are potentially - - and they're only accused, of course, of these crimes, so she recognizes that, and both of them said, when I questioned them, do you believe that police officers could do other than tell the truth, and they both

said yes.

In fact, they were smiling when I used the example of my son, who is now an attorney, who did not always tell the truth, and probably may even continue that way sometimes, and they both smiled when I said it because they recognized that, and I'm sure that their sons, during their lifetime, have lied to them, but the answer that their sons will not testify in this case nor will anybody from their precincts since neither one of them are in the precinct involved.

I don't understand the logic of that, because I understand people can be fair, and if they make up their mind to sit on a jury, they understand they must be fair. These ladies said they would be fair, and I questioned them about this situation, but we're not at those jurors yet, we're at the first two, and, therefore, based upon our discussion, I will deny the motion for the withdrawal of a juror based upon the fact that there was an - - action by the District Attorney to exclude all Puerto Rican jurors based upon only the question of ethnicity.

MR. BLAUSTEIN: Note my objection. Note my exception rather.

No. 89-7645

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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June 28, 1990

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QUESTION PRESENTED

Whether, in the trial of a Latino defendant, the prosecutor properly met his burden of coming forward with race-neutral reasons for his peremptory challenges of two Spanish-speaking prospective jurors, only one of whom had a Latino-sounding surname, where the prosecutor gave as his reasons, and the record established, that these jurors had indicated that they would have a difficult time accepting as final the English translation of Spanish language testimony in a case where important prosecution witness were expected to testify in Spanish.

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No. 89-7645

In The

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October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent requests that this Court deny Dionisio Hernandez's petition for a writ of certiorari seeking review of an order of the New York State Court of Appeals affirming his judgment of conviction for Attempted Murder in the Second Degree (New York Penal Law §§ 110.00/125.25[1]) (two counts), Criminal Possession of a Weapon in the Second Degree (New York Penal Law § 265.03), and Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02[4]). Hernandez was sentenced to concurrent terms of

imprisonment of four to twelve years for each attempted murder count, one and one-third to four years for second-degree possession of a weapon, and one to three years for third-degree possession of a weapon.

OPINIONS BELOW

The opinion of the New York Court of Appeals, affirming petitioner's conviction, is reported at 75 N.Y.2d 350, 553 N.Y.S.2d 85 (1990), and is reproduced in petitioner's Appendix at A. 1-22. The judgment of the New York Supreme Court, Appellate Division, Second Department, affirming petitioner's conviction, is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988), and is reproduced in petitioner's Appendix at A. 22-24.

JURISDICTIONAL STATEMENT

The decision of the New York State Court of Appeals was entered on February 22, 1990. The petition for certiorari was timely filed in this Court on May 23, 1990. This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

At approximately 4:30 a.m. on December 8, 1985, petitioner Dionisio Hernandez [hereafter referred to as defendant] chased Charlene Calloway down Tompkins Avenue near Hart Street in Brooklyn, and shot her twice in the head. Defendant then chased Ms. Calloway's mother, Ada Saline, to the door of a restaurant and fired directly at her head, but missed her when she dropped to the ground. The bullets shattered the glass door of the restaurant and injured two customers inside. Calloway and the injured customers were hospitalized for their injuries. Kings County Indictment Number 7649/1985 charged defendant with Attempted Murder in the Second Degree (two counts), Assault in the First Degree, Attempted Assault in the First Degree, Assault in the Second Degree (two counts), Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree (two counts).

The Jury Selection

After two rounds of voir dire, when nine jurors had been empaneled, defendant, a Latino, objected to the prosecutor's use of peremptory challenges to strike four potential jurors with allegedly Latino surnames. Defendant moved for a mistrial, claiming that the prosecutor had removed every Latino from the venire and that there was "a pattern here of eliminating Hispanics

from the jury" (A. 25-26, 29).[1] The prosecutor responded that he had challenged two of the jurors, Munoz and Rivera, because each had a brother who had been convicted of a felony by the Kings County District Attorney's Office. Munoz's brother was then being prosecuted for a violation of probation on that felony (A. 27-28). In addition, Rivera had indicated that time considerations might affect her ability to deliberate (A. 30-32).

The prosecutor stated that he had challenged the other two jurors, Mikus and Gonzalez, because each of them spoke Spanish and each had given the prosecutor reason to believe that he or she would have difficulty accepting the official court interpreter's translation of the testimony of Spanish-speaking witnesses, and might instead rely on his or her own understanding of the Spanish language testimony. The prosecutor's challenges were based on both jurors' hesitant answers to questions during a lengthy examination regarding their ability to disregard the answers in Spanish, and on their demeanor and failure to make eye-contact with the prosecutor during voir dire when questioned about this subject (A. 26-27, 30-31). The prosecutor stated that the ability to rely on the official translation of testimony given in Spanish was very important in this case because several witnesses, including Ada Saline, the chief prosecution witness, were expected to testify through a Spanish language interpreter (A. 27).

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[1] Page references refer to the state trial record except those preceded by "A," which refer to the minutes of the jury selection proceeding as paginated in the appendix to defendant's petition. Names identify the witnesses whose testimony is cited.

The prosecutor also argued that Mikus did not appear to be Latino, and stated that any race-related motivation an attorney might have for excluding Latinos was negated in this case because not only defendant, but every civilian prosecution witness, including each of the four victims, was Latino (A. 29-30).

The court denied defendant's mistrial motion, expressly rejecting the claim that the prosecutor had sought "to exclude all Puerto Rican jurors based upon only the question of ethnicity" (A. 38). The court found as a fact that the prosecutor's challenges were based on non-racial reasons, mentioning, as to two jurors, the concern about deference to the interpreter (A. 35). Defendant never argued that the prosecutor's concern about the jurors' language and the difficulty they might have in accepting the official translation of the testimony was an impermissible basis as a matter of law; nor did he question the facts in the record, including the jurors' hesitancy and refusal to make eye contact, which the prosecutor relied upon to support his contention that these two potential jurors might not accept as final the official translation of the evidence.

The Trial

The People's Case

At approximately 4:30 a.m. on December 8, 1985, Police Officers DENNIS CROWLEY and WILLIAM LIPP stopped their marked patrol car at a red light at the intersection of Hart Street and Tompkins Avenue in Brooklyn (Crowley: 26-28; Lipp: 101-03, 125-

30). The officers saw defendant, armed with a gun, chase Charlene Calloway across Tompkins Avenue in front of the police car, point his gun at Ms. Calloway's head, and shoot her from a distance of one foot. When Calloway fell to the ground, defendant leaned over and fired a second shot at her head. The officers later learned that Ms. Calloway was defendant's girlfriend at the time (Crowley: 25-28, 32-33, 36-37, 53-54, 68; Lipp: 101-103, 105, 107, 118-19, 125-30).

After defendant shot Ms. Calloway, the officers turned on the siren and red flashing lights of their patrol car and ordered defendant to drop the gun (Crowley: 35, 38-39, 68; Lipp: 105-06, 108). Ignoring the officers, defendant chased Calloway's mother, Ada Saline, toward the police car and up to the door of the Orocovis restaurant, located on the corner where the police car was stopped (Crowley: 37-38, 72; Lipp: 106-08). JOSE RUBERO, the manager of the restaurant, and two patrons, VINCENT ALGARIN, and FREDDY NIEVES, were inside the restaurant near the door (Rubero: 4-9, 11, 16; Algarin: 21; Nieves: 146-47).

As Mrs. Saline attempted to open the restaurant door, defendant ran up behind her, aimed his gun directly at her head and fired at least two shots from a distance of approximately two feet. Saline dropped to the ground as the first bullet shattered the glass door (Crowley: 40, 42; Lipp: 109; Rubero 13; Algarin: 22; Nieves: 149). Immediately after the door shattered, Mr. Algarin felt pain in his left thigh, where he had been struck by a bullet

(Algarin: 22-23). Mr. Nieves was struck in the arm by a second bullet (Nieves: 149-50).

After firing at Mrs. Saline, defendant turned, faced the officers, and pointed his gun at them (Crowley: 42-43; Lipp: 110, 125-26). Both officers then fired their guns at defendant and shot him (Crowley: 43-49, 45, 62-63; Lipp: 110, 112, 127, 132). Officer Crowley recovered defendant's five-shot .38 caliber revolver from the sidewalk. It contained five spent shells (Crowley: 46-47, 55, 75-76, 87-88; Lipp: 113, 138). A fully-loaded .25 caliber automatic pistol was recovered from an ankle holster on defendant's leg (Crowley: 48, 87-88; Lipp: 113, 133, 137).

Ms. Calloway, Mr. Algarin, and Mr. Nieves were rushed to nearby hospitals for treatment of their gunshot wounds (Crowley: 50-51; Lipp: 115-17, 120-21; Algarin: 22-23; Nieves: 149-50). Doctor CHRISTOPHER HAGER, an expert in general surgery, treated Calloway, who had three gunshot wounds: one in the palm of her left hand, and two in her head (Hager: 263-67). One bullet was fired directly into the canal of her left ear and lodged below the skin next to her brain (Hager: 264-65, 268-69). The second bullet entered just below her left ear, crossed to the opposite side of her neck, shattered two spinal vertebrae, and came to rest near the internal carotid artery (Hager: 264-65, 269-73). Calloway escaped permanent spinal cord damage, but either bullet could have killed her if it had gone any further (Hager: 272-75).

The Defendant's Case

Defendant Dionisio Hernandez admitted that he was carrying a loaded .38 caliber revolver and a loaded .25 caliber automatic pistol on December 8, 1985, but maintained that he had a valid permit to carry both of these weapons on the street (Hernandez: 287, 292-93, 299-300). According to defendant, he was walking with Ms. Calloway and Mrs. Saline down Tompkins Avenue towards the Orocovis restaurant on the corner of Hart Street at approximately 3:30 to 4:00 that morning, when two men, one armed with a gun, ran up to them and pushed defendant to the ground (Hernandez: 292-93, 339-42). Defendant asserted that he pulled out his licensed revolver and fired wildly into the air until it was empty (Hernandez: 293-94). According to defendant, after his assailants fled into the Orocovis restaurant, the police arrived and, for no reason, shot him twice from behind, hitting him in the left arm and leg (Hernandez: 294-96).

Defendant denied ever intending to kill or injure Ms. Calloway or Mrs. Saline, ever shooting at them, and ever pointing his gun at the officers (Hernandez: 296-98). He asserted that he was living with Calloway, then his girlfriend, on December 8, 1985 (Hernandez: 319, 325). Defendant denied that Calloway had left him a few weeks before the shooting and had returned to Saline's house to live (Hernandez: 318-19). He admitted that Calloway and Saline had gone to Puerto Rico together to visit friends at the beginning of his trial and that Calloway, whom he had married since the shooting, was using his credit card to pay for her trip

(Hernandez: 292, 353-55). Defendant claimed not to know exactly where the two were staying (Hernandez: 353-54).

The People's Rebuttal Case

Detective CASPAR L. GIBBS interviewed defendant at Kings County Hospital at 8:20 a.m. on December 8, 1985, approximately four hours after the shooting (Gibbs: 326, 368). After being advised of and waiving his Miranda rights, defendant told the detective that Ms. Calloway had left him approximately two weeks earlier and had returned home to her mother (Gibbs: 364, 375). Defendant explained that he had gone to a social club earlier that morning to see Calloway and found her speaking with her mother and two Latino men. Defendant claimed that when the men attempted to prevent Calloway and him from leaving, defendant pulled out his gun and began shooting inside the club. Defendant said that he shot at the men from left to right and that he may have accidentally shot Calloway in the process. Defendant asserted that when the men ran away, he chased them and they shot him (Gibbs: 364-65).

The Verdict and The Sentence

Defendant was convicted of two counts of Attempted Murder in the Second Degree, and of one count each of Criminal Possession of a Weapon in the Second and Third Degrees (531-32). The second-degree assault charges for shooting Algarin and Nieves were dismissed at the end of the People's case for failure to prove a prima facie case (284).

On January 30, 1987, defendant was sentenced to concurrent terms of imprisonment of four to twelve years on each attempted murder count, one and one-third to four years for second-degree weapon possession, and one to three years for third-degree weapon possession.

The State Court Appeals

On appeal to the Appellate Division, defendant argued that the trial court had erred when it found that the prosecutor's reasons for exercising peremptory challenges against four allegedly Latino potential jurors were race neutral. In particular, defendant claimed that the prosecutor's explanation that he had challenged two jurors because they spoke Spanish and indicated that they might have trouble accepting as final the English translation of testimony given in Spanish, was merely a pretext for racism. Defendant did not argue that a genuinely held belief in the inability of a particular potential juror to accept the official translation would be an impermissible basis for challenging that juror.

On May 16, 1988, the New York Supreme Court, Appellate Division, Second Department, unanimously affirmed defendant's conviction. The court held that defendant had made out a prima facie case of discrimination because, although the ethnicity of one of the challenged jurors was not certain, the prosecutor used peremptory challenges to exclude the only three prospective jurors who definitely had Latino surnames. People v. Hernandez, 140

A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988). The court then ruled that the prosecutor's reasons for challenging the prospective jurors were race neutral and were sufficient to rebut defendant's prima facie claim of discrimination. 140 A.D.2d at 543, 528 N.Y.S.2d at 625.

On appeal to the New York Court of Appeals, defendant again advanced the claim that the prosecutor's challenge of the two prospective jurors who spoke Spanish was racially motivated. For the first time, defendant asserted that the Spanish language and Latino origins are so inextricably intertwined that an exclusion of Latinos on the basis of language is inescapably an exclusion on forbidden ethnic or racial grounds. Defendant raised, also for the first time, a claim that the prosecutor's use of peremptory challenges violated the New York State Constitution, which, he asserted, provided for a greater degree of scrutiny of peremptory challenges than the Federal Equal Protection Clause.[2]

The Court of Appeals rejected defendant's claim that the language-ethnic factor alone determined this case. People v. Hernandez, 75 N.Y.2d 350, 356, 553 N.Y.S.2d 85, 87 (1990). The court affirmed defendant's conviction, ruling that the prosecutor's belief that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court, which the intermediate appellate court had found was supported by the record, was a legitimate neutral ground for

[2]Defendant also challenged two of the trial court's evidentiary rulings, but does not assert these claims before this Court.

exercising a peremptory challenge. 75 N.Y.2d at 356, 357-58, 553 N.Y.S.2d at 87-88. The court ruled that it was for the trial court to determine whether the prosecutor's explanation was pretextual or real and whether it was justified by the answers and conduct of the challenged jurors during voir dire. Relying on this Court's holding in Batson v. Kentucky, 476 U.S. 79, 98 n.21, 106 S.Ct. 1712, 1724 n.21 (1986), the New York Court of Appeals therefore ruled that the trial court's resolution of these issues was entitled to "great deference" on appeal, and stated that there was no basis in law or policy to conclude that the lower courts in this case had erred in these essentially factual determinations. 75 N.Y.2d at 356-57, 553 N.Y.S.2d at 87-88.

The two dissenting judges ruled that, primarily as a matter of state law, an explanation by a prosecutor that may appear facially neutral but nonetheless has a disparate impact on members of defendant's racial or ethnic group is "inherently suspect," and must be subjected to enhanced scrutiny. 75 N.Y.2d at 360-61, 363, 553 N.Y.S.2d 90-91, 92. The dissent held that there was an insufficient evidentiary record to meet this standard because the two Spanish-speaking jurors had assured the trial court that they would accept the official translation, and the prosecutor failed to establish that any other members of the panel had also been asked if they spoke Spanish. 75 N.Y.2d at 362-63, 553 N.Y.S.2d at 91-92.

On May 23, 1990, defendant filed this petition for a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

Defendant's petition for a writ of certiorari should be denied because this case does not present the issue upon which defendant wishes this court to rule. The jurors in this case were not challenged because they were Latino or because they spoke a language common only to defendant's ethnic group and which identified them as members of that group. Rather, as the New York State Court of Appeals properly determined, they were challenged because they had indicated that their knowledge of the Spanish language might interfere with their personal ability to accept the official translation of the testimony in this particular case, where the important witnesses were expected to testify in spanish. Thus, the peremptory challenges of the two Spanish-speaking potential jurors were based on race-neutral reasons rationally related to the facts of the case.[3]

Each of the two Spanish-speaking jurors, only one of whom had a Latino-sounding surname, had indicated, by hesitant answers and failure to make eye contact during extensive questioning on the subject, that his or her knowledge of the Spanish language might interfere with his or her duty to accept the evidence submitted by the court. The trial court and both state appellate courts properly ruled that the prosecutor's explanation for his challenges was based on facts other than race or ethnicity and was supported by the record. The courts also properly ruled that reluctance to

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[3]Defendant does not challenge the prosecutor's reasons for exclusion of the other two jurors, Munoz and Rivera.

accept the official translation of evidence given in another language is an appropriate neutral reason for challenging a prospective juror.

This case involved the expected testimony of one of the victims, Ada Saline, who had been an eyewitness to the entire shooting and who was expected to testify in Spanish with the assistance of a Spanish-language interpreter. Mrs. Saline's testimony was expected to be critical because defendant claimed that strangers had done the shooting, while the police officers had seen defendant shoot at the victims. Another of defendant's shooting victims, Freddy Nieves, also was expected to testify through the interpreter. Thus, the prosecutor had a valid, case-related reason to be concerned about the undue impact a prospective juror's understanding of Spanish could have on the outcome of this case, and was entitled to challenge potential jurors who had manifested uneasiness about accepting as authoritative the official court interpreter's translation of the testimony.

From the jurors' statements and demeanor during extensive questioning on this subject by both the court and the prosecutor, the prosecutor believed that there was a substantial question as to whether two jurors, Mikus and Gonzalez, would accept the interpreter's translation. The prosecutor explained:

> Your Honor, my reason for rejecting the -- these two jurors -- I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

> . . . We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I feel there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact on the jury.

(A. 27-28). Defendant responded that the prosecutor was seeking to exclude all Latinos from the jury because he was afraid that Latino jurors would be biased in favor of a Latino defendant, and argued that there was no reason to challenge the Spanish-speaking jurors because these jurors had informed the court that "they could be fair and they could render a fair and impartial verdict" (A. 35). Defendant did not contest the prosecutor's factual assertions that the jurors had been questioned in depth about whether they could accept as final the translated testimony and had expressed hesitancy about their ability to do so. The court responded to defendant's arguments stating:

> Therefore he [the Assistant District Attorney] didn't make a challenge for cause based upon that, but he said that the reason he did in fact remove these jurors is because even though they said they could listen to the interpreter and not let their own evaluation of what the witness says be the answer that they would utilize, he said I have grave doubts, and that's why I'm asking

(A. 35). Indeed, the prosecutor had already informed the court that he had not challenged the two Spanish-speaking jurors for cause because each had said that he or she could be fair and would try to accept the official court interpreter's translation of Spanish-language testimony (A. 35). The court then denied the mistrial motion (A. 38).

Thus, it is clear from the record that the prosecutor's challenge of the Spanish-speaking jurors in this case was entirely due to a reasonable belief that these two jurors would have trouble following the court's instructions to listen to and accept the official translation of the Spanish-speaking witnesses' testimony as the evidence in this case. The prosecutor was not concerned with the race or ethnicity of the people who spoke Spanish, but rather with their ability and willingness to hear and accept as authoritative the same evidence heard by the remainder of the jury.

The state courts appropriately applied the relevant legal test in denying defendant's claim. In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), this Court held that a prosecutor may not rebut a prima facie case of discrimination simply by stating "that he challenged jurors of the defendant's race on the assumption . . . that they would be partial to the defendant because of their shared race. . . . Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive" or by affirming his good faith. Id., 476 U.S. at 97-98, 106 S.Ct. at 1713-14. As the record above demonstrates, that is not what occurred in this case.

Instead, the prosecutor offered a trial-related reason for his challenges, which provided "some satisfactory ground other than the belief that [Latino] jurors should not be allowed to judge a [Latino] defendant." Id., 476 U.S. at 101-02; 106 S. Ct. at 1726 (White, J., concurring). As this Court held in Batson, while a prosecutor is forbidden by the Equal Protection Clause to challenge prospective jurors solely on account of their race, he or she is otherwise entitled to exercise peremptory challenges for any reason at all so long as that reason is related to the prosecutor's view of the outcome of the case. This Court also delineated the standard by which a prosecutor's explanation of his or her peremptory challenges is to be evaluated but did not, as defendant asserts, limit the possible legitimate reasons to a statement of a specific bias.[4] This Court ruled that a prosecutor "must articulate a neutral explanation related to the particular case to be tried," and stated that "there are any number of bases on which a prosecutor may believe that it is desirable to strike a juror who is not excusable for cause." This Court further noted that a prosecutor must give a "clear and reasonably specific" explanation for his or her "legitimate reasons" for exercising the peremptory

[4]Defendant's new claims, that only the articulation of a juror's specific bias, rather than concerns about the juror's fitness to serve on a particular case, can support a legitimate peremptory challenge, and that the prosecutor here failed to assert a bias-based reason to support his challenges, must be rejected by this Court because they were not asserted in any state court. See Kosak v. United States, 465 U.S. 848, 850 n.3, 101 S.Ct. 1519, 1521-22 n.3 (1984); United States v. Lovasco 431 U.S. 783, 789 n.7, 97 S.Ct. 2044, 2048 n.7 (1977) (both holding that this Court will not consider claims not asserted in the lower courts).

challenges. 476 U.S. at 98 n.20. The New York Court of Appeals properly applied these standards and determined that the reason given for challenging the Spanish-speaking jurors in this case was a neutral, case-related reason which was based on the jurors response to specific questions in voir dire.

It would disserve both the principle of Batson and the goal of fair trials to disallow any challenge to individual potential jurors who indicate during voir dire that they will, or might, be unable or reluctant to accept the official translation of testimony. Just as jurors are not permitted to be unsworn witnesses (see Parker v. Gladden, 395 U.S. 363, 87 S.Ct. 468 [1966]) or to rely on their own personal knowledge of the facts, the law, or the witnesses (see Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031 [1975]; Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 [1961]), it is crucial to a fair jury determination that the entire jury hear the same evidence and base its deliberations on that evidence, rather than on their own personal translation of the testimony. Nor would this concern be better met by having jurors who speak a foreign language "second seat" the official court interpreter and bring to the court's attention any reservations about the official translation, as defendant urges (defendant's petition at 8 n.5). The interpreter is certified by the court, required to take an oath of office, and is under a legal duty to translate the testimony accurately and to inform the court if he or she cannot understand the witness. Jurors are under no similar constraint.

Moreover, jurors who indicate that they may rely on their own translations will likely have an undue influence on other jury members whenever a dispute over translated testimony arises during deliberations, simply because they may claim that their recollection of the testimony is based on what the witness really said. In such a case differences over the testimony could not be resolved by the usual means of having the testimony in question read back to the jury since the record would contain only the official translation. In essence, these jurors would become unsworn, unexamined witnesses. Therefore, whenever a potential juror indicates that his or her knowledge of the foreign language in which a witness is expected to testify may interfere with that juror's ability to listen to and rely on the official translation of the witness' testimony, a challenge by either side is appropriate.

Defendant's claim that the Spanish language and Latino ethnicity are so inextricably intertwined that any challenge based on language is necessarily and irrefutably a challenge based on race was properly rejected by the New York Court of Appeals and has not been adopted by this or any other court. Knowledge of the Spanish language in this country is not limited to people of Latino descent. See State v. Pemberthy, 224 N.J. Super. 280, 540 A.2d 227, appeal denied, 111 N.J. 633, 546 A.2d 547 (1988) (peremptory challenges of all jurors who spoke Spanish, in a case involving the interpretation of audiotaped conversations in Spanish, found to be proper and race-neutral, particularly because one of the challenged

jurors was a caucasian who taught Spanish as a career). Nor do all Latinos in this country speak or understand Spanish. Although defendant cites statistics which show that the number of Latinos in Brooklyn, New York who speak Spanish exceeds the number of those who do not (see defendant's petition at 6 n.1), the statistics for Brooklyn may not be representative of the country as a whole.

Thus, common sense refutes defendant's claim that knowledge of the Spanish language defines Latino ethnicity as a matter of law. In any event, the state courts found as a fact that the jurors in this case were not challenged merely because they spoke Spanish, but because they indicated that their knowledge of the Spanish language might interfere with their ability to decide this case upon the same evidence as that understood by the prosecution, the defense, the court and the other members of the jury.[5]

Contrary to defendant's argument, a juror's hesitancy in promising to follow the court's instructions as to what constitutes the evidence is a valid reason for concluding that the juror might be unable or unwilling to follow the court's instructions, even if the juror ultimately claims to be able to put this hesitancy aside.

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[5]Moreover, this case does not present an appropriate factual record upon which to test defendant's language-ethnicity claim for three reasons. First, the prosecutor did not challenge the jurors simply because they understood Spanish. Second, as defendant's current counsel conceded in the amicus brief filed in the New York Court of Appeals, one of the challenged Spanish-speaking jurors, Mikus, did not have a Latino surname (see Brief for Amicus Curiae at 2-3 n.2), and therefore may not even have been Latino. Finally, the defendant did not challenge the prosecutor's or the court's factual characterization of the voir dire, which was not recorded. Thus, the validity of the trial court's factual findings cannot be contested on the record before this Court.

A peremptory challenge need not rise to the level of a challenge for cause. Thus, by its nature, a peremptory challenge may be based on a factor which, although it must be articulable with some specificity, would not support a cause challenge. Because a statement that a juror would not or could not follow the court's instructions is surely a valid basis for a cause challenge, a prosecutor's sincerely and justifiably held belief that a specific juror, despite his or her hesitant assurances to the contrary, would be unwilling or unable to follow the mandate of the court must be sufficient to support a peremptory challenge. Moreover, the jurors in this case were not merely a little hesitant to accept the translated testimony, nor did they simply have to think about the issue a short while before unequivocally assuring the court that they could follow the court's instructions as to what constituted the evidence. Instead, after lengthy questioning by both the court and the prosecutor on this specific issue, these jurors were only able to promise that they "would try" to follow the court's instructions to accept as final the translated testimony.[6]

The cases upon which defendant relies do not support his argument. Instead, these cases stand for the proposition that superficially neutral reasons are not to be accepted at face value, but must instead meet the following criteria: they must be

[6]There is absolutely nothing in the record to support defendant's current claim that every Latino potential juror would necessarily express a similar hesitancy to follow the law as provided by the court.

supported by the information revealed in voir dire; must be related to the case to be tried; must have been applied to all jurors sharing the characteristic, regardless of race; and must not be undermined by the prosecutor's admission of a racial bias. In short, any reason which is found to be pretextual rather than genuine must be rejected. In each of the cases, it was not the asserted reason for the challenge, but the facts which the prosecutor alleged to support the validity of the reason which the courts found to be improper as a matter of law. The Eighth Circuit Court of Appeals in United States v. Wilson, 884 F.2d 1121 (8th Cir 1989) (en banc) and the state courts in Minniefield v. State, 539 N.E.2d (Ind. Sup. Ct. 1989), State v. Slappy, 522 So.2d 18 (Fla. Sup. Ct.), cert. denied, __ U.S. __, 108 S.Ct. 2873 (1988), and People v. Johnson, 22 Cal.3d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (1978), rejected the prosecutors' explanations for challenging black jurors at the trials of black defendants because the voir dire records did not support the validity of the proffered explanations for the prosecutors' peremptory challenges.[7]

In Minniefield, Slappy and Johnson, unlike the instant case, the prosecutor never even questioned the challenged jurors about the particular infirmity the prosecutor feared they possessed, but assumed that all members of the defendant's racial group shared the bias. Here, the two Spanish-speaking jurors, only one of whom had

[7]In addition, Slappy and Johnson were decided under the State Constitutions of Florida and California, respectively, rather than the Federal Constitution, and thus have lessened precedential value in determining the parameters of the federal Batson rule.

a Latino-sounding surname, were questioned at length by both the prosecutor and the court about their ability to accept as final the translated testimony. Moreover, the New York Court of Appeals found no reason to disturb the trial court's conclusion that there was clear support in the record, based on this questioning, for the prosecutor's concern.

In United States v. Wilson, the Court of Appeals for the Eighth Circuit rejected the prosecutor's explanation for challenging a black juror who lived in the same town as the defendant, while not challenging a white juror who also lived in that town, even though both jurors had denied knowing defendant. The prosecutor asserted that he had challenged only the black juror because he feared that the defendant's friends would try to influence a black resident of the town but would not contact a white resident because there were racial conflicts in the town and "race sets it up like being a member of a lodge." 884 F.2d at 1122-23. The Eighth Circuit appropriately rejected the prosecutor's reasons, ruling that where the prosecutor indicates a stereotypical, racial reason for striking a potential juror, the district court's finding that race was not a factor in the prosecutor's exercise of the peremptory challenge is not supported by the record and cannot be affirmed on appeal. 884 F.2d at 1124-25. Here, by contrast, the prosecutor's belief that the two Spanish-speaking jurors might not follow the court's instructions to accept as final the translated testimony was supported by their responses to questioning by both the court and the prosecutor.

Defendant has never asserted, and there is nothing in this record to suggest, that the prosecutor failed to challenge equally hesitant Spanish-speakers who did not appear to be Latino or that the prosecutor relied on an unexplored fear that anyone who understood Spanish would be unable to follow the court's instructions to rely only on the translated testimony.

Defendant suggests that a prosecutor could not peremptorily challenge a potential juror whose clearly demonstrated bias or unfitness to serve was arguably related to race or ethnicity. For example, defendant appears to claim (defendant's petition at 12) that a prosecutor could not legitimately strike any prospective Latino juror from a jury convened to decide a "crime of passion" if the prosecutor demonstrated through questioning in voir dire that the particular juror possessed a "machismo" attitude or other characteristics which would prevent him from following the court's instructions on the law. That is surely not what Batson commands.

Of course, a prosecutor could not strike all Latinos on this basis without question, because the unsupported assumption that all Latinos share a cultural "machismo" concept which would prevent them from fairly judging crimes of passion is an improper reliance on a racial stereotype. But the mere fact that the particular juror's bias or unfitness arises from a cultural trait that might be shared by some other members of a particular racial or ethnic group does not insulate that juror from challenge, provided that the inference of bias or unfitness is supported by the juror's responses and behavior during voir dire. Defendant's analysis

would apparently preclude the prosecutor from removing jurors of one ethnic group whose personal views suggest a bias or an unfitness to serve, while permitting the exclusion of jurors of other ethnic groups who share the same unfitness or biased view, simply because the latter jurors do not share the race of the defendant.

Defendant's reasoning changes the Batson holding from a rule designed to prevent the improper use of peremptory challenges based solely on race to a rule which would use race to preclude neutral, case-related challenges. Such a rule would not further the concerns Batson was designed to answer -- the need to protect the citizens of this country from racial and ethnic discrimination in the selection of petit juries, while at the same time permitting the exercise of legitimate, case-related peremptory challenges.

In any event, this case is not about racially-discriminatory peremptory challenges, which cannot be tolerated; instead it involves the race-neutral challenges of jurors who hesitated at accepting the court's instructions. Therefore, because this case was properly decided under the standards set forth by this Court in Batson, does not involve an issue upon which there is a split in the Federal or State courts, and lacks the detailed factual record to support defendant's claims, defendant's application for a writ of certiorari should be denied.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
June 28, 1990

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF KINGS)

I, Theresa Zukas, being duly sworn, state that I am employed in the Office of the District Attorney for Kings County and am over the age of 18.

That on the 28 day of June 1990 I served this document by enclosing a true copy in a postpaid envelope addressed to: Ruben Franco, Kenneth Kimerling, & Arthur Baer, Puerto Rican Legal Defense & Education Fund, Inc., 99 Hudson St., New York, NY 10013
Attorney for: Dionisio Hernandez
at his/her office and by causing it to be deposited in an official depository of the United States Postal Service within the State of New York.

Theresa Zukas

Sworn to before me this 28
day of June 1990

Margaret E. Mainusch

MARGARET E. MAINUSCH
Notary Public, State of New York
No. 30-4962225
Qualified in Nassau County
Commission Expires Feb. 12, 19 92

APP-49 A

No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

vs.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 23, 1990
CERTIORARI GRANTED OCTOBER 9, 1990

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CHRONOLOGICAL DOCKET DATES

12/31/85	Kings County Grand Jury indicts petitioner Dionisio Hernandez.
11/3-7/86	Jury selected.
11/6/86	Petitioner's motion to strike jury based on claim of discrimination is denied.
11/17/86	Jury convicts petitioner of attempted murder and criminal possession of a weapon.
1/30/87	Petitioner sentenced to concurrent terms of four to twelve years on attempted murder, and one and one-half to four and one to three on weapons charges.
5/16/88	New York State Supreme Court, Appellate Division, Second Department affirms conviction.
2/22/90	New York State Court of appeals affirms conviction.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DIONISIO HERNANDEZ,

Defendant.

Indictment Number 7649/85

CRIMINAL TERM: PART 33
Brooklyn, New York
November 3-7, 1986

* * *

[19] MR. BLAUSTEIN: None by the defense.

Will the Court note the fact that I'm raising objection to counsel – to the District Attorney taking Spanish people off the jury. This is already the fourth person of Spanish descent who had a Spanish name that the District Attorney has excluded from the jury, and I think even Elizabeth Holtzman, the District Attorney, several months ago said that she does not favor the practice of [20] her District Attorneys rejecting blacks or Hispanics or minority people, and she made it very plain. It was on page one of the Law Journal, and I'm going to make an objection here at this time.

MR. McINTYRE: Yes, your Honor, may I respond?

MR. BLAUSTEIN: I'm going to make an objection at this time that he has rejected all the Hispanics, Judge. We have no Hispanics on this jury because of the District Attorney's challenges, either peremptory or for cause.

I'm sorry. They were all peremptory. They weren't for cause. He had no real reason to reject any of them.

MR. McINTYRE: Your honor, my reason for rejecting the – these two jurors – I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

MR. BLAUSTEIN: You mean the engineer couldn't understand?

MR. McINTYRE: Excuse me. I listened to you, Mr. Blaustein. Can you listen to me?

[21] MR. BLAUSTEIN: Go ahead, I'm sorry.

MR. McINTYRE: We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main

witnesses, they would have an undue impact upon the jury.

I see also, since Mr. Blaustein has raised the issue, that Mr. Luis Munoz – if that's who he's referring to – was challenged by the People. His brother had been arrested on a violation of probation, and I asked him several questions about that, not specific – not several questions about [22] that, but I did ask him about that, and I didn't feel he could be fair to the People with his brother currently being prosecuted by law enforcement in our office.

I don't know of any other Hispanics.

MR. BLAUSTEIN: Do you still think the jury can be fair when we have mothers who have sons who are police officers? Do you think it's fair to put them on a jury?

You picked out the man quickly enough as Munoz as the other Spanish-speaking man.

MR. McINTYRE: Excuse me.

MR. BLAUSTEIN: You mentioned his name. I couldn't even remember his name, but I remember there was one other Spanish boy that you dumped, and I'm going to at this time asked for a mistrial, Judge, based on the fact – based on the conduct of the District Attorney.

MR. McINTRYE: Your Honor, may I have a moment? I want to call my office.

THE COURT: About?

MR. McINTYRE: I would just like a moment to call my office.

MR. BLAUSTEIN: Can we have a ruling? I'm [23] moving for a mistrial.

MR. McINTYRE: I may want a supervisor over here.

MR. BLAUSTEIN: What is a supervisor going to do with this case?

MR. McINTYRE: Thank you.

THE COURT: Before I make a ruling.

(Pause in the proceedings).

MR. BLAUSTEIN: Let me renew my motion at this time.

THE COURT: Denied.

MR. McINTYRE: Let me respond also.

MR. BLAUSTEIN: I haven't had a chance to mention the names of the parties.

The District Attorney at this time is rejecting –

THE COURT: Two jurors.

MR. BLAUSTEIN: (continuing) – peremptorily Gonzalez, Mico (phonetically), and has rejected heretofore Munoz and Rivera, and I think that shows a pattern here of eliminating Hispanics from the jury, and I therefore move for a mistrial.

MR. McINTYRE: Your Honor, I have to respond just for the record. I do want to say, though, [24] before I respond to each of the individual jurors, that this case, involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are

going to be Hispanic. I have absolutely no reason – there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that. I'm just trying to find Mr. Rodriguez.

As I said about Mr. Munoz, his brother is being prosecuted by our office. His brother had a violation of probation. I don't think we went into any detail on the underlying crime, but I thought that as I questioned him on that, there might be some prejudice.

As I spoke to these last two, that is, her name is not Mico, I think it was Micous (phonetically) –

MR. BLAUSTEIN: Micous. I'm sorry.

MR. McINTYRE: (continuing) – his name is Gonzalez, and I questioned his at some length, and I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even [25] had to ask the Judge to question them on that, and their answers were – I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.

I'm having trouble finding the notes on Rivera. Do you know what round he was in, Mr. Blaustein?

MR. BLAUSTEIN: It was a she.

THE COURT: She.

THE CLERK: She was sitting in the back row.

MR. BLAUSTEIN: It wasn't a he.

MR. McINTYRE: I believe I even questioned – challenged her for cause, but I do know that her brother was arrested for gun possession, he's doing five years probation at this time.

In addition to that, she was the one who indicated that she would have a time problem if the case extended, and because of the length of the case and number of witnesses I had, I even questioned about whether or not she would feel the need to hurry up the case. I challenged her for cause, and the Judge denied my challenge for cause. You didn't consent to my challenge for cause.

[26] My reason was I felt that time would be a factor in her decision, and I also felt that the fact that her brother was currently on probation might also influence her decision.

Those are my reasons for the jurors that you have mentioned.

MR. BLAUSTEIN: In other words, you're telling the Court now that if we had four blacks on trial here, that you would eliminate all the blacks from the jury just because you're telling me that because there are four Spanish people involved, that's why you're eliminating four Spanish people?

MR. McINTYRE: I don't understand your logic.

THE COURT: I don't follow you at all there.

MR. McINTYRE: I think that the reasons I've given you have nothing to do with their ethnicity.

MR. BLAUSTEiN: It must be because you said we had four Spanish people involved in this situation and therefore you don't want four Spanish people on the jury. Now if that isn't prejudicial, I don't know what it is.

THE COURT: That's not what he said, Mr. Blaustein. I don't know if you don't know what he says or you don't hear what he says.

[27] What he said was why would he throw off Spanish people when all of his witnesses will be Hispanic people.

MR. BLAUSTEIN: Because he's afraid that there'll be sympathy by Hispanic jurors to Spanish defendants. That's as plain as the nose on my face.

THE COURT: Well, your nose is plain, I grant you that.

MR. McINTYRE: All the victims – that has nothing to do with it.

THE COURT: The victims are all Hispanics, he said, and, therefore, they will be testifying for the People, so there could be sympathy for them as well as for the defendant, so he said ot [sic] would not seem logical in this case he would look to throw off Hispanics, because I don't think that his logic is wrong. They might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter.

MR. BLAUSTEIN: Well, Judge, let me ask you this question. The People have consistently refused, to, in my challenges for cause, to reject [28] people who are relatives – whose close relatives' sons and brothers are police

officers. I mean, where's the logic there? I don't follow him. You mean that if you're Hispanic, you go off the jury, but if your son is a cop, you keep him on because it's very good to keep somebody on a jury whose son is a cop or whose brother is a cop or whose cousin is a cop?

MR. McINTYRE: May I say, Judge, just to respond once again, I don't want to be confused as saying I'm rejecting people who are Hispanic, but in every one of those cases where I didn't consent to your challenge for cause, Mr. Blaustein, those jurors said, when they were questioned by the Judge, that they could be fair.

Now, if you remember, there were a number of jurors who came up and spoke to the Judge, you and me, and who said they had friends who were police officers. It was a gentleman yesterday afternoon who said he had a friend who was a police officer, and he said he couldn't be fair. I consented. I consented to throw him off the jury.

Where a juror has said, however, that they have relatives or friends who are on the police [29] force and they can be fair, I don't think –

MR. BLAUSTEIN: Well, number two and number three, who you wanted to reject today, both said in response to his Honor's questions they could be fair and they could render a fair and impartial verdict.

MR. McINTYRE: Accordingly, I don't feel a challenge for cause lies.

THE COURT: Therefore, he didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they said they could listen to what the interpreter said

and not let their own evaluation of what the witness says be the answer that they would utilize, he says I have grave doubts, and that's why I'm asking –

MR. BLAUSTEIN: Let me point out to the Court at this time that if we are to pick prospective jurors, that we're going to wind up eventually with these two women whose sons are both police officers. They are either going to wind up as jurors or alternates.

What position does that put me in? I only have one peremptory challenge, Judge, and I'm being [30] short-circuited here very quickly and very cutely by the District Attorney. He knows what he's doing. He's got two women sitting in the back, both got police officer sons. You're going to tell me they're not going to be influenced in any manner if a cop gets on the stand and testifies? You have to be very naive if you think they don't discuss matters with their sons and that they are going to be – they're not going to bend backwards if they hear cops testifying. That's the only reason for – I think one of the reasons for getting rid of these two jurors.

We're left here with a very small panel. I'm left with one peremptory. My throat is being cut because eventually there are going to be two woman whose sons are cops. I have no choice. I won't be able to challenge them and dump them. What kind of fair trial is my client going to get?

MR. McINTYRE: So, Mr. Blaustein, you're in effect conceding that you have –

MR. BLAUSTEIN: No. These are the reasons –

MR. McINTYRE: Can I finish?

You're in fact then saying that there are reasons other than ethnicity for my challenging these [31] two jurors?

MR. BLAUSTEIN: I'm saying both ethnicity and the fact that you want to swing over to these other two women whose sons are cops.

MR. McINTYRE: As long as you're conceding –

MR. BLAUSTEIN: We can't possibly get a fair trial if that condition is going to continue here unless we put in 10 new jurors in the box and start with 10 new and pick jurors from there, Judge, and reject the ones we had, which would be the only fair thing to do, because I'm going to get caught here with two women whose sons are cops, they're not going to do me any good anywhere.

THE COURT: Well, Mr. Blaustein, you say that, and I'm satisfied that these jurors could be fair and impartial from what they said.

As a matter of fact, one of these two prospective jurors said her son in now in the 77th, but he wasn't there before, so she recognizes that some policemen do things that are potentially – and they're only accused, of course, of these crimes, so she recognizes that, and both of them said, when I questioned them, do you believe that police officers could do other than tell the truth, and they both [32] said yes.

In fact, they were smiling when I used the example of my son, who is now an attorney, who did not always tell the truth, and probably may even continue that way sometimes, and they both smiled when I said it because they recognized that, and I'm sure that their sons, during their lifetime, have lied to them, but the answer that their

sons will not testify in this case nor will anybody from their precincts since neither one of them are in the precinct involved.

I don't understand the logic of that, because I understand people can be fair, and if they make up their mind to sit on a jury, they understand they must be fair. These ladies said they would be fair, and I questioned them about this situation, but we're not at those jurors yet, we're at the first two, and, therefore, based upon our discussion, I will deny the motion for the withdrawal of a juror based upon the fact that there was an – action by the District Attorney to exclude all Puerto Rican jurors based upon only the question of ethnicity.

MR. BLAUSTEIN: Note my objection. Note my exception rather.

* * *

CHALLENGE SHEET

SUPREME COURT, KINGS COUNTY

Criminal Term, Part 33, 11th Term, 1986

THE PEOPLE, ETC.

vs.

DIONISIO HERNANDEZ

Before Justice GERALD J. BELDOCK

On trial for Att. Murd. 2d (2 cts.), etc.

Indictment filed 12-31-85

M. Bernstein, Clerk

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROUND I								
	WILLIAM M. SANDERS	24880	8301				X		
	3 ANTHONY CONGUISTA	24417	2139	1					

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	11 LUIS MUNOZ	24401	8765	2					
	1 HELEN DONAHUE	24011	5484					1	
	7 HERBERT HILLMAN	24414	6126					2	
	8 ALBERT MOORE	24602	4783					3	
	12 OREL BROWN	24308	1152					4	
	13 BERTH GOVAN	24313	7513	3					
	14 SALVATORE DURANTE	24881	0406					5	
1	2 STEPHEN YEARWOOD	24421	2387						

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
2	4 DELORIS RHONE	24006	5887						
3	5 PATRICIA LINDSEY	24000	6635						
4	6 ELLEN KARELITZ	24209	0168						
5	9 EARNESTINE ROSS	24403	5306						
6	10 RUBY A. LEWIS	24500	4532						
	ROUND II								
	FRANK J. SMITH	24519	6446				X		
	BETTY DUDAKOFF	24103	5140				X		

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROBERTA BEKERMANM	24208	5450						
	WINSTON HOWERTON	24319	2566				X		
	1 NORMAN FRANKEL	24104	3736	4					
	2 FLORENCE RUTIGLIANO	24009	9170	5					
	6 ROBERT WILNER	24209	4426	6					
	5 JUDITH EINSTOSS	24002	8177					6	
	4 JEANNE K. HAYHURST	24008	0422					7	
	3 MARGARET MC MANUS	24994	0267					8	

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	7 WANDA ESPOSITO	24009	1604	7					
	10 VALENTIN BURSZTYN	24604	3524	8					
	11 TERESA RIVERA	24415	1765	9					
	8 DOLLY MURREL	24881	3653					9	
	12 EVA COVINGTON	24214	3537					10	
	13 LOUISE MARINO	24505	3010		X				
	14 LISA OLIVERI	24011	6076					11	
7	9 SARAH STATON	24001	2216						

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROUND III								
	6 MARTHA SCIARA	24004	1518						
	HERBERT DAVIS	24012	8963	10					
8	1 MARTHA FREEMAN	24312	7991						
9	3 ELMA COPELAND	24515	3780						
	2 FANNIE BLACKMAN	24405	2615					12	
	5 ELLA. J. DIXON	24517	3149					13	
	7 CATHERINE SWALLOW	24203	0701					14	

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROUND IV								
	ETHELINE BLACKMAN	24514	4608				X		
	WILLIE GUILLOT	24994	0536				X		
	DOLORES IEN	24519	7386				X		
	OLGA MARTIN	24506	5158				X		
	LILLIAN SINKLER	24009	8685				X		
	ABBY LEVY	24420	3853				X		
	ANTHONY BORDONARDO	24881	474				X		
	ELIZABETH ELLISON	24510	0450				X		

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	NATALIE MAIDA	24224	0128				X		
	EVELYN JAFFE	24004	6143				X		
	ANA MARIA LOPEZ	24207	8663				X		
	KEITH ROBERTS	24884	1181				X		
	ELIZABETH BUTLER	24603	2865				X		
	ANNA MONTONARO	24004	4673				X		
	LLOYD WILDER	24518	5112			X			
	TIMOTHY LIGHTS	24514	4224						

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	ROSLYN SIMON	24319	9244						
	JULIUS FRANCUCCI	24002	2568						
	JERRY RAVSKI	24305	4896						
	SANFORD GOLDSTEIN	24418	5368						
	SUSAN TULL	24507	2149	13					
	2 ISMAEL GONZALEZ	24509	9947	11					
	3 LYDIA MIKUS	24507	3673	12					
	6 MULYN FARNWEATHER	24506	5930	14					

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
	10 MARCELLA HUWER	24009	0038				15		
	11 RODNEY NEBLETT	24010	0367	15					
10	7 MARILYN DANITI	24311	6378						
11	9 ELIZABETH KOKLAS	24002	7926						
12	12 MARIE ADAMO	24510	1325						
	ROUND V								
	IDA BAKER	24012	5389				X		
	WILFRED W. TORRES	24413	7757				X		

Accepted Juror's Seat	JUROR'S NAME		Ballot No.	PEOPLE Perempt. Chal.	PEOPLE Chal. Sustained	EXCUSED By Court	EXCUSED By Consent	DEFENDANT Perempt. Chal.	DEFENDANT Chal. Sustained
ALT1	1 ALICE LUNDRIGAN	24007	9297						
ALT2	2 CONCETTA PULCRANO	24110	1606						
ALT3	3 LIBERINA AMBROSINO	24521	1080						
ALT4	4 HELGA HOLLAND	24524	4383						

Supreme Court, Appellate Division,
Second Department.

The PEOPLE, etc., Respondent,

v.

Dionisio HERNANDEZ, Appellant.

May 16, 1988.

Before THOMPSON, J.P., and LAWRENCE, EIBER and BALLETTA, JJ.

MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Beldock, J.), rendered January 30, 1987, convicting him of attempted murder in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant, who is Hispanic, claims that the prosecutor used his peremptory challenges to exclude from the jury all panel members with Hispanic surnames, thereby violating the defendant's equal protection rights (*see, Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S. 2d 94, 516 N.E.2d 1208). Although the ethnicity of one challenged juror is not certain, the record reveals that the prosecutor did in fact peremptorily challenge the only three prospective jurors who definitely had Hispanic surnames. Therefore the defendant has made out a prima facie case of discrimination (*see, Batson v. Kentucky, supra,*

476 U.S. at 96; 106 S.Ct. at 1722; *People v. Scott, supra,* 70 N.Y.2d at 423, 522 N.Y.S.2d 94, 516 N.E.2d 1208). However, as to all the challenged jurors the prosecutor came forward with race neutral explanations for his challenges sufficient to rebut the defendant's prima facie showing (*see, Batson v. Kentucky, supra,* 476 U.S. at 96-97, 106 S.Ct. at 1722-23). Two of the jurors were dismissed because they had close relatives who had been prosecuted by the district attorney's office and there was a question as to their impartiality. The remaining two jurors, including the one whose Hispanic origin was questionable, were challenged because they both spoke Spanish and indicated during the voir dire that they might have difficulty accepting as final and authoritative the court interpreter's translation of the testimony. Although these explanations may not have risen to the level of those needed to justify a challenge for cause, they were sufficient to satisfy the prosecutor's burden to come forward with nondiscriminatory reasons for his challenges (*see, Batson v. Kentucky, supra,* at 97, 106 S.Ct. at 1723; *People v. Baysden,* 128 A.D.2d 795, 513 N.Y.S.2d 495; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 115, 516 N.E.2d 1228; *People v. Cartagena,* 128 A.D.2d 797, 513 N.Y.S.2d 497; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 116, 516 N.E.2d 1229).

Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,

v.

Dionisio HERNANDEZ, Appellant.

OPINION OF THE COURT

BELLACOSA, Judge.

Defendant's essential argument attacks the judgment of conviction as having been secured in violation of his equal protection rights because, as he asserts, the prosecution discriminatorily exercised its peremptory challenges to exclude two Latino persons from the jury that ultimately found him guilty of two counts each of attempted murder and criminal possession of a weapon (*see, Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69). Defendant, also a Latino, satisfied the *Batson*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *supra*), threshold predicate of discriminatory use of peremptory challenges by the prosecutor's rejection of all the Latino prospective jurors.

The dispositive issue – circumscribed in this case by pertinent undisturbed factual findings – is whether the prosecution can be said to have failed to satisfy its burden, in turn, to come forward with a neutral explanation for its eschewal of those prospective jurors so as to refute the inference of purposeful discrimination. The two prospective jurors at issue, who were fluent in Spanish, indicated, according to the prosecutor's articulated belief, that they would only try to respect as authoritative the official court interpreter's translation of evidence given

by Spanish-speaking witnesses. This prosecutorial assertion, sufficiently documented by the record and supported in the findings of the two lower courts, warrants our concluding that the prosecutor fulfilled his burden of coming forward with a satisfactory explanation that the peremptory strikes in this case were neutral and nondiscriminatory. We thus affirm the order of the Appellate Division, 140 A.D.2d 543, 528 N.Y.S.2d 625, which had affirmed the conviction.

The conviction, after a jury trial, arose out of a shooting in which defendant had attempted to kill his young woman friend and her mother as they left a restaurant in Brooklyn. During the incident, random shots from defendant's gun struck and wounded two other patrons of the restaurant.

Prior to trial and after the voir dire examination of 63 jurors had been completed and nine jurors had been selected, defense counsel objected to the prosecutor's use of peremptory challenges excusing four potential jurors with Latino surnames. Over the course of an extensive record colloquy, defense counsel objected repeatedly that the prosecutor had removed every Latino from the venire and moved for a mistrial.

The Assistant District Attorney responded that he had challenged two of the jurors, Munoz and Rivera, because each had a brother who had been prosecuted by the same District Attorney's office and that in his opinion these jurors could not be fair in their deliberations on the case. The prosecutor further explained that he had challenged the other two jurors, Mikus and Gonzalez – the only jurors pertinent to the disposition of the issue before

us – because each had given him a basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses. Among selected expressions made during the colloquy, the prosecutor proffered this summary for the record: "ASSISTANT DISTRICT ATTORNEY: Your Honor, my reason for rejecting the – these two jurors – I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is *I feel very uncertain that they would be able to listen and follow the interpreter. * * * We talked to them for a long time; the Court talked to them, I talked to them.* I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. *They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact on the jury.*" (Appellant's appendix, at A-23–A-24 [emphasis added]; *see also*, appellant's appendix, at A-26–A-28, A-29). The trial court then denied defendant's mistrial motion, stating: "THE COURT: Therefore, he [Assistant District Attorney] didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they

said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize, he said *I have grave doubts, and that's why I'm asking*". (Appendix, at A-32 [emphasis added].) The case was tried with no Latinos on the jury and defendant was convicted. The Appellate Division affirmed the judgment of conviction and a Judge of this court granted leave to appeal.

New York's Criminal Procedure Law provides a method for both the prosecution and defense counsel to challenge for cause the selection of a potential juror if it can be shown that bias may prevent that juror from deciding the case impartially (CPL 270.20). Additionally, a limited number of peremptory challenges – because counsel may intuit a bias that is not documentarily demonstrable sufficient for a challenge for cause – are allowed to exclude jurors usually without any explanation (CPL 270.25).

The 1986 rule in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *supra*, added restrictions to the exercise by prosecutors of their peremptory challenges against members of a defendant's racial class. It abandoned the prosecutorially weighted evidentiary tilt of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 and imposed a new and important calculus. To succeed initially in erecting the presumption of purposeful discrimination, the defendant must demonstrate (1) membership in a "cognizable racial group"; (2) the exercise of peremptory challenges by the prosecutor to exclude members of the defendant's group; and (3) "facts and any other relevant circumstances rais[ing] an inference" of a

discriminatory purpose (*Batson v. Kentucky*, supra, 476 U.S. at 96, 106 S.Ct. at 1722).

At that point the burden shifts to the prosecution to come forward and overcome the attribution and inference of purposeful discrimination with an articulable neutral explanation for having excused those jurors. The prosecutor's explanation need not rise to the level for sustaining a challenge for cause. On the other hand, the prosecutor cannot simply state that rejecting the jurors rested on the assumption they might be favorably disposed to the defendant because of shared race or ethnic similarities. While the prosecutor has this burden of coming forward, "the ultimate burden of persuasion" must be carried by the person alleging the intentional discrimination (*Batson v. Kentucky, supra*, at 94, n. 18, 106 S.Ct. at 1722, n. 18). By these respective weights, *Batson* calibrates the test and burdens while supplying a potent and appropriate remedy against invidious petit jury discrimination.

In *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S.2d 94, 516 N.E.2d 1208, we applied the *Batson* rule retroactively under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. Defendant, a black woman, was charged with murdering and robbing a white man. There were five black prospective jurors in the venire and the prosecutor excused them all peremptorily. We held that the prosecutor's " 'pattern' of strikes" gave rise to an inference of discrimination satisfying defendant's lighter burden (*People v. Scott, supra*, 70 N.Y.2d at 425-426, 522 N.Y.S.2d 94, 516 N.E.2d 1208). We reversed without having to address in that case the issue of what constitutes a neutral explanation under *Batson*.

Here, no one challenges the triggering of *Batson's* threshold. The exercise of prosecutorial peremptory challenges to exclude the only Latino jurors in the prosecution of a Latino defendant is enough (*Batson v. Kentucky*, 476 U.S., *supra*, at 96-97, 106 S.Ct., at 1722-1723; *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S.2d 94, 516 N.E.2d 1208, *supra*). The only new issue, circumscribed here by pertinent undisturbed factual findings, is whether the prosecution responded with a satisfactory nondiscriminatory explanation for excluding the only Latino jurors. Defendant contends as a matter of law that the burden has not been met because the Latino origins and the Spanish language are so inextricably intertwined that an exclusion of Latinos on the basis of language is inescapably, almost irrefutably, an exclusion on forbidden ethnic or racial grounds.

These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony. So it cannot be, as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic identity factor alone determines this case.

Rather, the prosecutor's belief was that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court. That is a legitimate neutral ground for exercising a peremptory challenge, and it was for the trial court to determine if the prosecutor's explanation was pretextual or real and justified by the answers and conduct of the two jurors during voir dire. Indeed, the Supreme Court

itself recognized that resolution of these issues springing from the *Batson* test were rightly reposed in fact-finding courts entitled to "great deference" with customary appellate oversight (*Batson v. Kentucky*, 476 U.S., *supra*, at 97-98, n. 21, 106 S.Ct., at 1723-1724, n. 21). That reasonable minds could disagree at this level of review on this record demonstrates the wisdom and propriety of the Supreme Court's and our view that, in the distribution of judicial functions among courts, deference generally to the fact-finding and evidence-viewing court is warranted in these circumstances. The trial court accepted the prosecutor's explanation, as did the Appellate Division, and we have no basis in law or policy to conclude that those courts erred in these essentially factual determinations.

Indeed, the prosecution documented its belief on the jurors' statements and on doubt-raising body language descriptions (e.g., averted eyes and gazes on being questioned on the critical points) developed during an extensive voir dire and placed on the record before the Trial Justice, who was also present at the entire voir dire. The record-based beliefs, advanced to satisfy its *Batson*-based burden, do not appear to us as a matter of law and did not appear to the lower courts as a matter of fact to be some facial facade. If the court was not satisfied with the adequacy of this explanation after watching and listening to the proceedings, of course it could have conducted a further voir dire; but under the circumstances presented here, that was a matter within the trial court's discretion.

The burden, moreover, does not require the prosecution, as the dissenting opinion would, to come forward with reasons rising, in effect and function, to a sustainable challenge for cause, for that would extend *Batson*

and *Scott*, not apply them. Justice Powell's opinion for the Supreme Court in *Batson* is the primary source of guidance and development, and it is carefully modulated to require that the prosecution must show only a neutral record-based belief for exercising a now properly circumscribed statutory right of peremptory excusal of jurors. To bear a proper and balanced burden of coming forward with a neutral explanation of a peremptory excusal of a juror is one thing; to create a new, higher burden of disproving, under "enhanced scrutiny" and the "inherently suspect" classification, a subjective, even "unconscious," state of mind is quite something else. This would be practically and legally speaking an impossible and ultimate burden of proof, not the lesser burden of coming forward with a justifiable explanation. Indeed, this rule would not just circumscribe the exercise of a peremptory challenge by the People; it would change its very nature because the People would have to prove cause for removal as to the juror and absolute purity as to themselves.

In sum, we view quite straightforwardly the essence of this case as being really about a prosecutor's court-accepted explanation concerning the ability of these jurors – or any sworn jurors no matter their race or ethnic similarities – to decide a case on the official evidence before them, not on their own personal expertise or language proficiency (*compare, People v. Legister*, 75 N.Y.2d 832). Hesitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges. The findings here of a legitimately articulated reason

rooted in principles of jury selection, responsibility and function are valid and supportable in this record.

It is important to emphasize, however, that pretextual maneuvering or less verifiable manifestations of jurors' attitudes about adhering to governing instructions will not satisfy the prosecution's burden. Thus, our holding in no way diminishes the apodictic policy and precedents at issue, which we unequivocally reaffirm.

Our analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right, as no justification for breaking new ground as to this clause by differentiating between this dually protected constitutional right is sufficiently advanced (*see, Under 21 v. City of New York*, 65 N.Y.2d 344, 360, 492 N.Y.S.2d 522, 482 N.E.2d 1; *Matter of Esler v. Walters*, 56 N.Y.2d 306, 313-314, 452 N.Y.S.2d 333, 437 N.E.2d 1090).

Defendant's remaining contentions of evidentiary trial errors involving impeachment, bolstering and cross-examination are unavailing, because in the circumstances of this case these matters were within the range of the trial court's discretion.

There being no equal protection violation or any other error warranting disturbing the actions of the courts below, the order of the Appellate Division should be affirmed.

TITONE, Judge (concurring).

I am in complete agreement with and wholeheartedly join in the majority opinion by Judge Bellacosa. In addition, the posture in which the *Batson* question is presented here prompts me to set forth my own, strongly held beliefs on the subject of post-*Batson* peremptory challenges.

In his concurrence in *Batson v. Kentucky*, 476 U.S. 79, 102-108, 106 S.Ct. 1712, 1726-1729, Justice Marshall made the observation that the potential for racial discrimination is inherent in the very notion of a system of juror challenges that need not be explained. He further noted that a prosecutor's seemingly neutral verbiage explaining his use of peremptories can easily mask an underlying racist animus, whether conscious or unconscious, adding another layer of complexity to the trial court's task of assessing the propriety of the proffered explanation.

Justice Marshall's comments highlight for me the very profound difficulties involved in reconciling a juror challenge system that is theoretically based on the attorney's inexplicable personal hunch with a constitutional rule that requires attorneys to offer satisfactory "neutral" explanations for their choices. The mandated inquiry, as it is conceived in both the majority and the dissenting opinions, entails an analysis that looks beyond the prosecutor's stated explanation in certain instances, and considers the prosecutor's subjective motivations and state of mind. The inquiry thus renders what was originally to be a matter of unexplained choice into an exploration that is in some respects more complex, and certainly more intrusive, than the objective inquiry involved in resolving juror challenges for cause. Moreover, because, as the dissenter notes, racist motives are

easily concealed, there is no assurance that even an in-depth inquiry will be effective in eradicating racial bias in the jury selection process.

The Supreme Court's decision in *Batson* was a welcome, necessary and important judicial statement that racial bias and racist motivations have no place in our American courtrooms. In the final analysis, however, the most significant development to come out of *Batson* may well lie in Justice Marshall's observation that "only by banning peremptories entirely can such discrimination be ended." (476 U.S., at 108, 106 S.Ct., at 1729.) Even *Batson*, as Justice Marshall noted, permits a degree of discrimination by establishing a threshold test for a prima facie case that tolerates some number of unexplained ethnically targeted challenges (476 U.S., at 105, 106 S.Ct., at 1727 ["(p)rosecutors are left free to discriminate * * * provided that they hold that discrimination to an 'acceptable level' "]). Manifestly, an institution that furnishes the opportunity for racial discrimination, at any level, is – and will continue to be – highly problematic in a society that has grown increasingly intolerant of judgments made on the basis of stereotyping in any form.

At this point in the evolution of this legal issue, I suspect that rather than developing a complex set of judicially imposed limitations and standards, the most constructive course would be for the Legislature to take a hard look at the existing peremptory system with a view toward determining whether it is still viable, at least as it is presently constituted.* Whether or not Justice Marshall

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* It may well be that a system with a drastically reduced number of peremptories for each side would adequately serve

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was correct in his assumption that the historic institution of peremptory challenges simply cannot be purged of its potential for discriminatory practices, it has become increasingly clear that judicial efforts to accomplish that goal can lead only to new layers of inquiry and complex tests that are fundamentally incompatible with the institution's basic premise (*see, People v. McCray*, 57 N.Y.2d 542, 545-549, 457 N.Y.S.2d 441, 443 N.E.2d 915). While such efforts can and must continue to be made, it seems to me that the time is fast approaching for the Legislature to rethink its policy choices in this highly sensitive area of law.

KAYE, Judge (dissenting).

The special importance of this appeal is that it calls upon us, for the first time, to spell out the People's burden once a defendant has established a prima facie case of discrimination in the exercise of peremptory challenges. The United States Supreme Court has not yet been required to do that; nor has our only other opinion on point – *People v. Scott*, 70 N.Y.2d 420, 522 N.Y. S.2d 94, 516 N.E.2d 1208. By this case we thus set a course for the future in this State, marking out the tolerable limits for the People's exercise of peremptory challenges.

The course we now set, I believe, diminishes the declared principle that peremptory challenges cannot be

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the essential purpose of permitting some unexplained juror challenges (*see, People v. McCray*, 57 N.Y.2d 542, 547-549, 457 N.Y.S.2d 441, 443 N.E.2d 915), while at the same time minimizing the opportunity for and incentives to engage in purposeful discrimination.

used to discriminate against racial or ethnic groups. As Justice Marshall cautioned in *Batson v. Kentucky*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror". (476 U.S. 79, 106, 106 S.Ct. 1712, 1728.) If that is all that is required, the majority's decision proves his point that there is indeed little real protection in defendant's newly recognized equal protection rights. I therefore respectfully dissent.

Preliminarily, this case should be decided as a matter of State law, rather than Federal law (majority opn, at 358, at 88 of 553 N.Y.S.2d, at 624 of 552 N.E.2d).

Issues involving the proper exercise of peremptory challenges are especially suited to resolution as a matter of State law at this time. As Justice White made clear in his *Batson* concurrence, "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid." (476 U.S., at 102, 106 S.Ct., at 1726.) In a matter of such day-to-day vital importance locally, the citizens of this State would be well served by the development of an authoritative body of State law instead of being held in suspense, case-by-case, over the next decade of litigation while the United States Supreme Court fleshes out the newly recognized minimum equal protection right that will prevail across the Nation. Several other State courts do exactly this. Indeed, the independent development of State law concerning peremptory challenges has proved particularly beneficial nationally as well as locally. It was, after all, State courts independently construing their State Constitutions that ultimately led the Supreme Court in *Batson* to abandon *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct.

824, and follow "the lead of number of state courts construing their State's Constitution." (*See, Batson v. Kentucky*. 476 U.S., *supra*, at 82, n. 1, 106 S.Ct., at 1715, n. 1.)

Moreover, it cannot be assumed that State law would proceed in lockstep with Federal law as the Federal law on this issue emerges. While this court in *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915, *cert. denied* 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322, declined to read the State equal protection right differently from then-existing Federal law, *Batson* has effected a very significant change in Federal law that might well alter that conclusion. Just such a shift occurred only recently with respect to the exclusionary rule (*see, People v. P.J. Video*, 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556, *cert. denied* 479 U.S. 1091, 107 S.Ct. 1301, 94 L.Ed.2d 156; *see also, People v. Johnson*, 66 N.Y.2d 398, 411, 497 N.Y.S.2d 618, 488 N.E.2d 439 [Titone, J., concurring]).

Thus, I would decide this case as a matter of State law, agreeing with the observation of the New Jersey Supreme Court that the fact "[t]hat the United States Supreme Court has overruled *Swain* in *Batson* does not mean that the laboratories operated by leading state courts should now close up shop." (*State v. Gilmore*, 103 N.J. 508, 522, 511 A.2d 1150, 1157.)

Reaching the merits, if our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this court in defining and protecting defendant's nascent constitutional right has

been virtually surrendered at the outset. While the Trial Judge's observations of the unfolding events are of course important, there is still a significant role for this court in clearly articulating the standard and then determining the law question whether the People have satisfied that standard. That has not been done.

This case differs from other "*Batson*" cases in a critical respect that is not, sufficiently credited by the majority. Here, the prosecutor's "neutral" explanation is one that necessarily produces disparate impact on a single ethnic group. The statistics before us indicate that, in Kings County, virtually all Latinos speak Spanish at home. That this case additionally involves testimony of witnesses in Spanish and an official translator hardly minimizes the potential for disparate impact: we are advised that the State court system employs 113 Spanish translators – presumably rendering accurate translations in court proceedings – who are engaged more than 250 times a day. Accepting as a sufficient explanation that the prosecution will offer the testimony of a witness whose native tongue is Spanish – whether or not an interpreter is required – too easily circumvents the People's obligation and the defendant's right, and allows the prosecutor to do by indirection what can no longer be done directly.

An explanation by a prosecutor that may appear facially neutral but nonetheless has a disparate impact on members of defendant's racial or ethnic group is "inherently suspect." (Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of A Delicate Balance*, 79 J.Crim.L. & Criminology 1, 54 [1988].)

Consequently, a reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be accepted (*see, State v. Slappy*, 522 So.2d 18 [Fla]; *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792; *State v. Gilmore, supra; see also*, 2 LaFave & Israel, Criminal Procedure § 21.3 [1989 Pocket Part]). To conclude otherwise can too easily permit discriminatory practices to continue. " '[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.' * * * A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective [Latino] juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. * * * [P]rosecutor's peremptories are based on their 'seat-of-the-pants instincts' * * * Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice." (*Batson v. Kentucky*, 476 U.S., *supra*, at 106 S.Ct., at 1728 [Marshall, J., concurring].)

Here, there is not a sufficient evidentiary record to support the prosecutor's explanation. Two persons believed to be of "Spanish descent" were excluded because their Spanish language fluency "might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony." (Majority opn., at 356, at 87 of 553 N.Y.S.2d, at 623 of 552 N.E.2d.) The majority skews the issue when it states that this case is really about these jurors' ability "to decide [the] case on the official evidence before them, not on their own personal expertise or language proficiency"

(majority opn., at 357, at 88 of 553 N.Y.S.2d, at 624 of 552 N.E.2d); if that were so they undoubtedly would have been excused for cause. Despite this court's repeated reference to the two jurors' initial expressed uncertainty or hesitancy, the fact remains that both individuals satisfied the court that they would accept the official court translation, and that they would be fair and impartial jurors. As the Trial Judge stated on the record, and two jurors "said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize." Similarly, the prosecutor acknowledged that the jurors' "final answer was they could do it" (i.e., accept the official court translation as final).

While the People emphasize their interest in excluding Spanish-speaking jurors because of the presence of an interpreter, there is no indication that any other members of the panel were also asked if they spoke Spanish. Charged by defense counsel with discriminating against the two, it is significant that in offering his explanation to the trial court the prosecutor made no indication of similar interest about the balance of the panel (*cf., State v. Antwine*, 743 S.W.2d 51 [Mo], *cert. denied* 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 [reasons given – inattentiveness during voir dire and relative in prison – were also reasons used to challenge whites]; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 [reason given – no ties to community – also used to challenge whites]; *see also*, 2 LaFave & Israel, *op. cit.*).

Thus, given the potential for disparate impact and the meager record made by the People on the issue, I

cannot agree with the majority that the People have satisfied their burden of rebutting the prima facie case of discrimination in this case.

Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny. The objective of such scrutiny is not to equate peremptories with challenges for cause but to determine whether the proffered ground is indeed an appropriate reason to exclude such groups from the jury at all. Additional voir dire, either directed or conducted by the court, may not always be necessary, but some investigation or inquiry beyond the minimum mandated in the ordinary case is. Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications without close inspection would be intolerable.

In any event, certainly something more is required than the prosecutor's reference to a subjective impression (based on lack of eye contact) of the sincerity of the jurors' assurances that they would accept the interpreter's version of what the witnesses said. All that we know for certain in this case is that defendant is a Latino, and every Latino has been excluded from a panel of 63

individuals. That being so, the inference remains unrebutted that the trial prosecutor struck the last two Latino jurors on the basis of an intuitive judgment deriving from their heritage. The Supreme Court in *Batson* concluded that the prosecutor "may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race." (476 U.S., at 97, 106 S.Ct. at 1723.) On this record, we really have no more than that.

Finally, I must question the majority's facile assumption that the explanation offered by the prosecutor was a valid trial-related concern at all. If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish. Surely, the majority does not intend to suggest, on the other hand, that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed. And if the prosecutor's concern is merely that the jurors may become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors. What is not a permissible method of addressing the situation is the wholesale exclusion from the jury of anyone sharing defendant's racial or ethnic background.

On this record, the removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned. I would reverse the Appellate Division order and order a new trial.

WACHTLER, C.J., and SIMONS and TITONE, JJ., concur with BELLACOSA, J.

TITONE, J., concurs in a separate opinion.

KAYE, J., dissents and votes to reverse in another opinion in which HANCOCK, J., concurs.

ALEXANDER, J., taking no part.

Order affirmed.

SUPREME COURT OF THE UNITED STATES

No. 89-7645

Dionisio Hernandez,

Petitioner

v.

New York

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of New York.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable "race neutral" explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

2. Where a trial court has accepted the prosecutor's proffered explanation as being race neutral, what standard of review is to be applied by reviewing Courts?

October 9, 1990

Justice Souter took no part in the consideration or decision of this petition.

No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

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QUESTIONS PRESENTED

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable "race neutral" explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

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No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 75 N.Y.2d 350, 553 N.Y.S.2d 85, 552 N.E.2d 621 (1990) and found in the Joint Appendix at A26.[1] The opinion of the New York State Appellate Division is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dept. 1986) and is found in the Joint Appendix at A24. The opinion of the New York State Supreme Court is not

[1] Citations to the Joint Appendix shall be indicated by "A" and the page number.

reported, and the transcript of the oral decision is found in the Joint Appendix at A2.

JURISDICTION

The jurisdiction of the Court is based on 28 U.S.C. § 1257(a). The petition for certiorari was filed on May 23, 1990, and certiorari was granted on October 9, 1990. A46.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Dionisio Hernandez was charged in a New York State criminal proceeding with attempted murder, assault and criminal possession of a weapon. The charges arose from an incident in which it was alleged that petitioner attempted to kill his fiancée and her mother. Two patrons of a restaurant were wounded in the incident.

Jury selection took place on November 3-7, 1986. There was no transcript maintained of the voir dire examination. On November 6, 1986, after the examination of sixty-three jurors had been completed and nine jurors

had been selected, defense counsel objected to the prosecution excluding all potential Latino jurors by the exercise of peremptory challenges. A2. In explaining his reasons for the exercise of four of his peremptory challenges, the prosecutor stated as to two of the Latino jurors:

> [M]y reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter. * * * We talked to them for a long time: the Court talked to them, I talked to them. I believe that in their heart they will try to follow [the interpreter's translation], but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

A3-4. Both jurors, however, ultimately affirmed that they would accept the interpreter's interpretation and neither was challenged for cause. A9-10. The prosecutor explained that the other two Latinos who had been peremptorily challenged had family members that had been or would be prosecuted by his office. A6-7. The trial judge made no specific finding that the proffered explanations were nondiscriminatory and, without probing the reasons given, denied the petitioner's motion. A12. The empaneled jury included no Latinos.

Following a trial, the judge dismissed the assault charges involving the two men in the restaurant. The jury returned a guilty verdict on the charges of attempted murder and criminal possession of a weapon.

On appeal, the New York State Supreme Court, Appellate Division held that the petitioner had made out a prima facie case of discrimination. However, the court lacked a transcript of the voir dire and therefore, without any analysis, concluded that the prosecutor had stated nondiscriminatory reasons for his challenges. A25. It affirmed the conviction.

The New York State Court of Appeals also affirmed the conviction, but by a divided court. The majority opinion, joined by four judges, found that there was a prima facie case of discrimination. However, it found, under *Batson v. Kentucky*, 476 U.S. 79 (1986), that the prosecutor had stated a race neutral reason for the challenges to the Latino jurors. The majority held that the two jurors had given the prosecutor a "basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses." A28. It gave great deference to the trial court's determination of nondiscrimination.

> [I]t was for the trial court to determine if the prosecutor's explanation was pretextual or real — and justified by the answers and conduct of the two jurors during voir dire. Indeed, the Supreme Court itself recognized that resolution of these issues springing from the *Batson* test were rightly reposed in fact-finding courts entitled to "great deference" with customary appellate oversight . . . That reasonable minds could disagree at this level of review on this record demonstrates the wisdom and propriety of the

> Supreme Court's and our view that, in the distribution of functions among courts, deference generally to the fact-finding and evidence-viewing court is warranted in these circumstances.

A31-32 (citation omitted).

One judge, in a concurring opinion, invited the New York State legislature to consider eliminating or limiting the use of peremptory challenges. A36-37.

Two judges in dissent urged a reversal of the conviction. A37-45. The dissent argued that the appellate courts could not simply defer to the trial court's findings:

> [I]f our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this court in defining and protecting defendant's nascent constitutional right has been virtually surrendered at the outset. While the Trial Judge's observations of the unfolding events are of course important, there is still a significant role for this court in clearly articulating the standard and then determining the law question whether the People have satisfied that standard.

A39-40. On their review of the record, they would have found a violation of the Equal Protection Clause.

The dissent found that the prosecutor's Spanish language-based reason for his challenges was inherently suspect because of the disparate impact on Latinos. "Consequently, a reason that is grounded largely in speculation rather than facts uncovered in voir dire examination, as revealed by the record, should not be accepted." A41 (citations omitted). They argued that because both jurors had satisfied the trial court that they would accept the official court translation, the majority was incorrect in

asserting that the case involved whether the jurors would "decide [the] case on the official evidence before them." A41. Moreover, there was additional indicia of discrimination since the prosecutor failed to demonstrate that he had sought to determine whether non-Latino jurors also spoke Spanish. A42. Therefore, the dissent found that there was an insufficient basis in the record to support the trial court's finding that there was no violation of *Batson*.

The dissent concluded by describing the constitutionally intolerable impact of the majority's ruling:

> Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny. . . . Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of juries of permitting such language-based justifications without close inspection would be intolerable.

A43.

SUMMARY OF THE ARGUMENT

This case will determine whether *Batson* will have any meaning and effect for Latinos. The reason given by the prosecutor in this case for excluding Latino jurors was based on the Spanish language ability of the jurors. Language based reasons are integrally linked to national

origin. Therefore, the prosecutor's explanation was a per se violation of the Equal Protection Clause. In Brooklyn, where the trial took place, over 96% of all Latinos could have been excluded based on their ability to speak Spanish. If Spanish language ability can be used to exclude Latinos from juries, Latinos throughout the country will be virtually eliminated from cases where there is a chance of Spanish testimony.

The error of the New York courts was their failure to recognize that the reason given by the prosecutor was based on the Spanish language ability of the jurors. The prosecutor did not say so explicitly, but his explanation revealed that this was his basis. He stated that he had doubts whether the jurors could follow the interpreter's interpretation of proposed Spanish language testimony. He stated that the jurors had answered questions about their obligation to follow the interpreter by saying that they "would try;" that is, try to disregard what they heard in Spanish from the witness and rely only on what they heard in English from the interpreter. The jurors ultimately affirmed that they would accept the interpretation. The prosecutor stated that the jurors' initial "hesitant" answers led him to speculate that although the jurors were willing to follow the interpretation, they "could" not comply. The trial court and the appellate courts in New York found that the prosecutor's reliance on his speculations about the jurors were not language-based, and therefore they were neutral reasons under *Batson*.

It is apparent, however, that the prosecutor's reasons were based on the Spanish language ability of the jurors. The jurors' "I-will-try" answers to questions about the interpreter are the natural and honest responses. In essence, the jurors had been asked whether they could

parse out and disregard what they had heard in Spanish from the witness and rely only on what they heard in English from the interpreter. It is inherently a difficult undertaking. As this Court has recognized in other settings, *see, e.g., Bruton v. United States*, 391 U.S. 123 (1968), being able to separate out and disregard something heard in court is a complex mental gymnastic. It is particularly difficult for a bilingual juror to disregard what comes from the lips of the witness and rely only on what is often a less complete interpretation, in both words and nonverbal indicia of truthfulness, such as pauses and emphasis. The jurors honestly answered, as would any bilingual juror, that they would try not to rely on what they heard in Spanish. As a matter of law and jurisprudence, it is presumed that they will follow the court's instructions and rely only on the English language interpretation. The jurors affirmed that they would.

Thus, the "I-will-try" answers are a function of the Spanish language ability of the jurors and the difficulty of what is being asked. Because the answers are based on language ability, these two Latino jurors are not distinguishable from other Latino bilingual jurors. The same response would be given by all bilingual persons. Indeed, in this case both jurors answered in the same way. The court below erred in not recognizing that the prosecutor's reasons were language-based and therefore violative of the Fourteenth Amendment. Prosecutors can rely on the explanation offered in this case any time they want to exclude Latino jurors. If the decision is allowed to stand, *Batson* will essentially not apply to Latinos.

The Fourteenth Amendment's Equal Protection Clause cannot be so easily evaded; particularly, where there is a nondiscriminatory alternative to satisfy the

alleged concerns of the prosecutor here. As is done in many jurisdictions, including New York, bilingual jurors can be instructed by the court that if they hear any mistakes in the interpretation they should pass a note to the bailiff. Then the court can determine if the mistake is material; and if it is, seek to have it clarified. There is no need to exclude Latinos from juries because they speak Spanish.

Plenary review is appropriate to correct, as a matter of law, this per se violation of *Batson*. Furthermore, even if there is no per se violation, independent plenary review is the standard of appellate review required by the Fourteenth Amendment of all *Batson* claims. This Court, in a series of cases beginning with *Norris v. Alabama*, 294 U.S. 587 (1935), has held that plenary review was the required standard for claims of jury discrimination. Due deference is given to the trial court's findings of historical and subsidiary facts including findings of credibility, but the appellate court must make its own independent decision as to whether the jury selection process is race neutral. It is only through independent review that the equal protection standards for neutrality can be set and enforced.

Claims of jury discrimination strike at the very integrity of the judicial system. They are too important to be left to the trial courts alone. The same values that this Court was protecting in *Norris* and its progeny are at issue in *Batson* cases. Plenary and independent review should be the standard for all appellate courts.

This Court should reverse the New York State Court of Appeals and find a per se violation of *Batson*. Alternatively, because the New York State Court of Appeals failed to provide plenary review and because there were

no specific findings of fact by the trial court nor any record of the voir dire, this matter should be reversed and remanded to supplement the record and review the determination under the correct standard.

ARGUMENT

POINT I

THE PROSECUTOR'S BASIS FOR CHALLENGING LATINO JURORS WAS DISCRIMINATORY ON ITS FACE

Introduction

The real issue presented by this case is whether Latino jurors can ever sit in judgment in criminal cases in which there may be testimony in Spanish.[2] If prosecutors are permitted to peremptorily challenge Spanish-speaking jurors because of their ability to speak Spanish, very few juries will include Latino jurors. For example in Brooklyn, where this trial took place, approximately 96%[3]

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[2] This includes all cases in which there are witnesses who will testify in Spanish. It includes, as well, all cases in which there is a Spanish speaking defendant because he or she may decide to testify. Nationally, as of 1975, 42% of all Latinos claimed that Spanish is their first language, the language that they usually use. Estrada, Leobardo F., *The Extent of Spanish/English Bilingualism in the United States*, Aztlan, Int'l J. of Chicano Studies Research, Vol. 15, No. 2, Fall 1984 at 381. Therefore, in cases in which any Latino is involved there is over a 40% chance that an interpreter may be used.

[3] This figure is based on the comparison of 1980 Census data reflecting the total number of Latinos in Brooklyn (Kings County, New York) with the number of persons reporting that Spanish is spoken in the home. 1980 Census of Population, 1

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of all Latinos speak Spanish and could have been excluded from hearing this case.

A. The Prosecutor Based His Challenges On The Spanish Language Ability Of The Latino Jurors

The prosecutor in this case used his peremptory challenges to exclude all Latino jurors from the jury. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a prima facie case of discrimination had been established. A31. Once there is a prima facie case, a prosecutor must provide clear and specific nondiscriminatory reasons related to the case for the exercise of these peremptory challenges. *Batson*, 476 U.S. at 98 and n.20. As to two of the challenged Latino jurors, the proffered explanation was based on the jurors' Spanish language ability. Because of the integral relationship between speaking Spanish and being Latino, a decision based on Spanish language is tantamount to a decision based on Latino national origin.[4] *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); and, *see*, *Lau v. Nichols*, 414 U.S. 563 (1974); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1042-1043 (9th Cir 1988), *vacated as moot*, 109 S. Ct. 1736 (1989); *Olagues v. Russoniello*, 797 F.2d 1511, 1520-21 (9th

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General Social and Economic Characteristics, Vol. 34 (N.Y.) tables 51 and 172 at 651, 923. It assumes that persons who speak Spanish at home are Latinos.

Nationally, according to one study, 78% of all Latinos spoke Spanish. Estrada, Leobardo F., *The Extent of Spanish/English Bilingualism in the United States*, Aztlan, Int'l J. of Chicano Studies Research, Vol. 15, No. 2, Fall 1984 at 383.

[4] The majority opinion below accepted this a fortiori connection between language and ethnicity, but failed to decide the case on that basis. A31.

Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987).[5] It was therefore a facially discriminatory reason and a per se violation of *Batson* and the Fourteenth Amendment. *Id.*; *and, see, United States v. Lopez*, 86 CR. 513 (N.D. Ill. 1987) (Lexis 9544 U.S. Dist.)[6]

However, the prosecutor did not explicitly rely on the Spanish speaking ability of the jurors. Rather he questioned whether these two jurors could accept the court interpreter's interpretation[7] of proposed Spanish language testimony:

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[5] The integral connection between language and national origin is also well established in statutes and regulations. See, e.g., 20 U.S.C. § 1703(f) (prohibiting discrimination on the basis of national origin by the failure of schools to take appropriate action to overcome language barriers in order to provide equal services); 42 U.S.C. § 1973aa-1a (providing voting rights protection to "language_minorities"); 29 CFR 1606.6 (prohibiting national origin discrimination in employment on the basis of language).

[6] In *Lopez*, a defendant sought to have an exclusively bilingual Spanish-speaking jury because the accuracy of translations of out-of-court tape recordings of Spanish-language conversations was at issue. The Court held that such a jury would be discriminatory in violation of 18 U.S.C. § 1862:

> § 1862 prohibits the exclusion of jurors based on their national origin, and while it is true that many people are bilingual who are not Hispanic, there can be no question that the majority of Spanish-speaking jurors in the Chicago area are Hispanic . . . [T]he exclusion of jurors who only speak English would . . . be statutorily prohibited . . .

Id. 86 CR 513 (N.D. Ill. 1987) (Lexis 9544 U.S. Dist.)

[7] Although the word "translation" is often used, technically a translation describes a written document that has been

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> [M]y reason for rejecting these two is I feel very uncertain that they would be *able* to listen and follow the interpreter. * * * I didn't feel, when I asked them whether they could accept the interpreter's translation of it, I didn't feel that they *could*. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter.

A3-4 (emphasis added). Based on the jurors' answers to voir dire questions, the prosecutor speculated that the jurors lacked the *ability* to disregard the Spanish language testimony.[8] The majority decision below correctly recognized that the jurors' "hesitancy" or "I-will-try" answers were based on their Spanish language fluency:

> The prosecutor further explained that he challenged the other two jurors . . . because each had given him basis to believe from words and actions that *their Spanish language fluency* might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses.

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translated from one language to another. An interpreter converts an oral statement in one language into an oral statement in another language.

[8] The prosecutor did not question the two jurors' willingness to be bound by the interpreter's interpretation; but because of their Spanish language fluency, he questioned their ability to do it. He stated that he believed that the Latino jurors desired to follow the instructions regarding the interpreter: "I believe that in their heart they will try to follow it." A3. However, he questioned the jurors' actual capacity to follow the court's instructions: " . . . I feel very uncertain that they would be *able* to listen and follow the interpreter." *Id.* (emphasis added).

A27-28 (emphasis added). Thus, the actual basis of the challenge was the jurors' Spanish language ability.[9] Nevertheless, the court below found that the prosecutor's reason was race neutral because he did not rely directly on Spanish language ability, but on his belief that the jurors could not follow the interpreter's interpretation of testimony. A31.

The error below was the failure to recognize that the "I-will-try" answers of these two Latino jurors, upon which the prosecutor based his challenges, were themselves based on Spanish language ability and upon the questions that were asked. Any honest bilingual juror would have answered the prosecutor in the exact same way. In essence, these jurors had been asked whether they could reject what they hear in Spanish and only rely on what they hear in English from the interpreter.[10] To comply with what they had been asked to do, the jurors must first be able to separate out what is heard and understood in Spanish from what is heard and understood in English and then disregard the Spanish language testimony. This Court on several occasions has recognized the difficulty that jurors face in following

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[9] The prosecutor did claim that, in responding to his questions, these jurors avoided eye contact with him. A3. However, Latinos often out of respect for authority avert their eyes. See, Final Report of the New Jersey Supreme Court Task Force of Interpreter Translation Services, *Equal Access to the Courts for Linguistic Minorities*, (May 22, 1985) at 33. His misunderstanding of this cultural practice is part of the unconscious racism that often underlies peremptory challenges. See, *Batson*, 476 U.S. at 106 (Marshall, J. concurring).

[10] *See, e.g., Santana v. New York City Transit Authority*, 132 Misc.2d 777, 505 N.Y.S.2d 775, 778 (Sup.Ct. 1986).

instructions that require them to parse out certain evidence and disregard it. *See, e.g., Bruton v. United States*, 391 U.S. 123, 132-133 (1968); *Jackson v. Denno*, 378 U.S. 368, 388 (1964). These Latino jurors were asked to do the same thing in disregarding the Spanish language testimony. It is inherently a difficult task, and the jurors honestly answered that they would try to do it. At the end of the voir dire questioning process, these jurors had affirmed that "they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize." A9-10. The prosecutor acknowledged that the jurors could not be challenged for cause. A9. Therefore, it was the jurors' initial "hesitant" responses to these difficult questions that allegedly led to their exclusion.

As bilingual people, the jurors knew from their own experience of seeing subtitled Spanish-language movies, reading books in Spanish and English or interpreting for their friends or family that understanding what is said in the original language is probably more complete, in both words and nonverbal indicia of truthfulness, and perhaps more accurate than the English interpretation.[11] Thus in

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[11] As one court has noted:

> In any trial where an interpreter's services are required, the party/witness, at the outset, is placed at a disadvantage. Much of the impact and demeanor of the party/witness becomes obscured by the presence of an interpreter. The jury's attention tends to become transfixed on the interpreter, an unexpressive participant in the trial.
>
> English is a very expansive and expressive language and an interpreter may at times have to make a choice between two or more words which are

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affirming their willingness to follow the instruction to disregard the Spanish-language testimony, these Latino jurors naturally and honestly responded that "they would try" to do it rather than an initial unqualified and emphatic affirmative response. Following such instructions is a difficult task of "mental gymnastic[s]." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). It is not that it cannot or will not be done. It is assumed, as a matter of law and jurisprudence, that the jurors will do it. *Bruton*, 391 U.S. at 135. But, the doing of it is difficult, and, therefore, their honest answer is that they will try. Significantly, not only one but both jurors had the same "hesitant" response. Their answers to the voir dire questions, based on their "Spanish language fluency" (A28) are the same as would be expected from every honest bilingual Latino.

The same type of "hesitancy," exhibited by these two jurors or other bilingual Latinos, would exist if jurors generally were each questioned about their willingness and ability to follow other court instructions to disregard

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> similar in definition. An interpreter tries not to put words in the most emphatic way unless absolutely required. Inevitably, due to the spontaneity of the interpreter's translation or the lack of an exact translation of a word, it is possible that the interpreter may not choose the best word possible, thus causing a deviation in the intended communication to the jury. However, the use of a specific word can have a significant impact on what is being communicated.

Santana, 505 N.Y.S.2d at 779.

statements made in court.[12] For example, after evidence of a defendant's prior criminal record is admitted by a Federal District Court pursuant to Rule 404 of the Federal Rules of Evidence, the jury is instructed:

> Evidence that an act was done at one time or on one occasion is not any evidence or proof that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment. Evidence of these past acts is admitted only to show intent, knowledge or lack of mistake.

See, e.g., United States v. Reese, 568 F.2d 1246, 1251 (6th Cir. 1977). If the trial judge then asked each juror whether he or she could follow that instruction and disregard the

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[12] One observer of mock juries used to evaluate the impact of an interpreter on a juror's understanding of testimony noted:

> [Hispanic mock jurors] in fact do pay attention to Spanish language testimony as given by a testifying witness. This is something the Court officially tells bilingual jurors not to do, something akin to a judge telling a jury to disregard testimony that it has heard but that has been ruled inadmissible after an attorney's objection has been sustained. Clearly, what jurors are told to disregard after they have heard it cannot assumed to be wiped out entirely from their memory. Similarly, it would be highly difficult for a bilingual person to blot out speech he understands simply because he has been told to do so, especially since he knows that the *real* testimony is not that of the interpreter, but that coming from the lips of the person who is answering the attorney's questions.

Berk-Seligson, Susan, *The Bilingual Courtroom*, Univ. of Chicago Press (1990) at 167-168 (emphasis in the original).

past criminal acts in judging the guilt or innocence of the defendant, the honest and natural response of a juror would be, "I will try."[13] This response reflects both the willingness of the juror to comply and the difficulty of the task. Of course, jurors are not asked, and it is assumed that they actually follow the court's instructions. *See, Bruton.*

Here, only Latino jurors or Spanish-speaking jurors are asked this type of question. Their responses to the voir dire questions are no different from what other Latino bilingual jurors would have answered. An "I-will-try" response is purely a function of language ability. Thus, these Latino jurors were singled out and peremptorily challenged here because of their Spanish language ability, an integral element of their national origin. The New York Court of Appeals erred in not treating the prosecutor's explanation as impermissibly based on language and national origin in clear violation of *Batson*.

B. There Is A *Batson* Violation Regardless Of The Prosecutor's Good Or Bad Faith

A violation of the Equal Protection Clause does not turn on the lack of good faith, but rather on the reliance on race as a factor. *City Of Richmond v. Croson*, 488 U.S. 469 (1989); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Hernandez*

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[13] This Court has recognized that other types of questioning of jurors will naturally lead to qualified affirmative responses. *Adams v. Texas*, 448 U.S. 38, 49-51 (1980); *see, similarly, People v. Turner*, 42 Cal.3d 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986).

v. Texas, 347 U.S. 475, 481-482 (1954).[14] Regardless of good faith or bad faith, a decision to exclude jurors based on their race or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment. *United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989) (en banc)[15]; *Thompson v. State*, 548 So.2d 198 (Fla. 1989); *State v. Cantu*, 778 P.2d

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[14] This Court neither in *Swain v. Alabama*, 380 U.S. 202 (1965) nor in *Batson* imputed any malice or bad faith to prosecutors who relied on the race of the juror in exercising peremptory challenges in any individual case. In fact, the *Swain* Court found race-based exclusions in individual cases an acceptable practice:

> It [the peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

Swain, 380 U.S. at 220-221 (footnotes omitted); *see similarly, id.* at 211-212. *Batson* simply held that the Fourteenth Amendment Equal Protection Clause made race an impermissible factor in individual cases. Prosecutors could no longer rely on the previously acceptable assumption that "black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S at 89.

[15] In *Wilson*, in response to a prima facie *Batson* violation, the prosecutor stated that an African American juror who was peremptorily challenged lived in the same town as the defendant, who was also African American. He argued that the juror would be influenced by the defendant or contacted by his friends. He said that a white juror from the same town, who was not challenged, would be less likely to be influenced or contacted because she was white. He testified that race is "like being a member of a lodge." *Wilson*, 884 F.2d at 1124. The Eighth Circuit found that the explanation was not race neutral.

517 (Utah, 1989); *Minniefield v. State*, 539 N.E.2d 464 (Ind. Sup. Ct. 1989); and *see, People v. Johnson*, 22 Cal.3d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (1978).[16] The challenges of

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[16] In *Minniefield* and *Johnson*, prosecutors exercised their peremptory challenges to remove African Americans because of their concern that African American jurors would react negatively to a prosecution witness who used racial epithets. Despite this case-related, ostensibly good faith reason for the challenges, the courts nevertheless found violations of the Fourteenth Amendment or their own constitutions. The challenges were all based on race.

Similarly the Second Circuit Court of Appeals, in construing the Sixth Amendment, held that although race may be case-related, it serves no governmental purpose and is violative of the Constitution:

> In a case where a black defendant has been charged with a crime that has aroused racial passions, one may believe that whites *qua* whites are more likely than blacks *qua* blacks to convict; this, however, does not bespeak of a greater objectivity so much as it does a greater propensity to convict: Obviously, the responsibility of the state and its prosecutor is not to secure a conviction at all costs; it is to see that justice is done, and the constitutional wisdom is that justice is best served by a jury that represents a cross section of the community, not one from which cognizable groups have been systematically eliminated because of their group affiliations.

McCray v. Abrams, 750 F.2d 1113, 1131 (2d Cir. 1984), *vacated and remanded for further consideration in light of Batson* 478 U.S. 1001 (1986). *Batson* says the same thing about the overriding importance of nondiscrimination under the Fourteenth Amendment. *Id.*, 476 U.S. at 86. Case related peremptory challenges that enhance convictions cannot be based on race and national origin. *State v. Townes*, 220 N.J. Super. 38, 531 A.2d 381 (1987).

these two Latino[17] jurors were based on national origin regardless of the motives of the prosecutor. The prosecutor's reliance on the jurors' honest and natural

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[17] Even if Spanish-speaking non-Latinos are similarly challenged, it does not change the analysis. The use of Spanish language has been the basis of many cases of discrimination against Latinos. See, e.g. *Gutierrez*, 838 F.2d 1031. Language ability is related to national origin in much the same way as skin color is often connected to race. Spanish language ability is not totally inclusive of all Latinos, nor is a dark complexion totally inclusive of African Americans. (Plessy of *Plessy v. Ferguson*, 163 U.S. 537 (1896) was described as "seven eighths Caucasian and one eighths African blood; that the mixture of colored blood was not discernible in him". *Id.*, 163 U.S. at 541). Similarly neither language nor color are totally exclusive of other national origin or racial groups. As there are some non-Latinos that speak Spanish, there are persons of black and brown skin color who are not African Americans. Nevertheless, exclusion of jurors based on Spanish language ability is a per se violation of *Batson*, in the same way exclusion based on skin color would be for African Americans. For example, if there was an issue in a case of the accuracy of eye witness testimony of a white witness identifying an African American defendant, a prosecutor could not peremptorily challenge all African Americans because of his belief that African Americans may doubt the identification testimony of a white. Those discriminatory challenges would not be neutralized if in addition the prosecutor challenged a dark complexioned Pakistani, Sicilian, or Puerto Rican, for the same reason. *But see, State v. Pemberthy*, 224 N.J. Super. 280, 540 A.2d 227, *appeal denied*, 11 N.J. 633, 546 A.2d 547 (1988) (The New Jersey intermediate appellate court accepted as race neutral a prosecutor's peremptory challenges of both Latino and non-Latino jurors based on Spanish language ability. The major issue at trial was the accuracy of translations of out-of-court statements of the defendants. Both parties were offering expert testimony on the translation.)

"hesitancy" as the basis for the challenges, does not neutralize the reason for the challenges.

While there may be reason to challenge the credibility and the good faith of a prosecutor who relies on reasons like the one offered in this case,[18] it is not necessary to do so. It is sufficient that this Court find that the proffered reasons are based on Spanish language ability and thus national origin. It is a per se violation of the *Batson* and the Fourteenth Amendment.

C. A Finding Of A Per Se Violation Protects The Efficacy Of *Batson*

This Court's finding of a per se violation of the Fourteenth Amendment here is necessary to protect the efficacy of *Batson*. Because the so-called "hesitancy" of a bilingual juror in answering questions about the duty to disregard the Spanish language testimony of a witness is natural and honest, a prosecutor can readily rely on it any time he or she wants to exclude Latino jurors. As it was recognized in *Batson*, prosecutors have often assumed that minority jurors will be more sympathetic to minority defendants than they will be to the State. *Id.*, 476 U.S. at 97, and 101 (White, J. concurring) ("It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread . . . "). Although this assumption was condemned

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[18] The dissent below would have found that the prosecutor's reasons were pretextural. A41-43. The prosecutor cited nothing in the record that showed that these two jurors would either be partial to the defendant or against the State. Thus, it is fair to conclude that the prosecutor simply did not want Latinos to judge the conduct of another Latino. A reason that is specifically rejected by *Batson*. *Id.*, 476 U.S. at 97.

as discriminatory in *Batson*, its accuracy was not refuted. See footnote 14 *supra*. Thus, there is a high likelihood that prosecutors, in an effort to win their cases, will continue this practice and exclude Latinos. If the decision below is allowed to stand, prosecutors will have a ready made "nondiscriminatory" explanation: the juror's "hesitant" responses to questions about following the interpreter.[19] In most cases, it would be nearly impossible to demonstrate that this explanation, as a factual matter, is a pretext for discrimination. The explanation for these peremptory challenges would all be based on the actual, record-based "hesitancy" of bilingual jurors. *Batson* will provide no protection for Latino defendants or Latino jurors.

This Court should not let history repeat itself. It took the Court 21 years to recognize that *Swain* had created an

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[19] As the dissenting opinion in the court below stated:

> Here, the prosecutor's "neutral" explanation is one that necessarily produces disparate impact on a single ethnic group. The statistics before us indicate that, in Kings County, virtually all Latinos speak Spanish at home. . . . [We] are advised that the State court system employs 113 Spanish translators – presumably rendering accurate translations in court proceedings – who are engaged more than 250 times a day. Accepting as a sufficient explanation that the prosecution will offer the testimony of a witness whose native tongue is Spanish – whether or not an interpreter is required – too easily circumvents the People's obligation and the defendant's right, and allows the prosecutor to do by indirection what can no longer be done directly.

A40 (dissenting opinion); *see also, Smith v. Texas*, 311 U.S. 128, 132 (1940) ("If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.").

impossible evidentiary burden and that discrimination was continuing unabated. *Batson*, 476 U.S. at 92. This Court should act now to protect Latinos and give substance to the words of *Batson*. Requiring a criminal defendant to prove pretext when language based reasons are given establishes an almost insurmountable evidentiary burden. As the dissent below stated: "In this State [or country], with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications . . . would be intolerable." A43 (dissenting opinion).

D. A Finding For Petitioner Will Not Curb The Legitimate Use Of Peremptory Challenges

By finding a per se violation in this case, this Court will not interfere with the traditional purpose of peremptory challenges, to obtain an impartial and unbiased jury:

> Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides." *ibid.* [*Swain*, 380 U.S. at 219] thereby "assuring the selection of a qualified *and unbiased* jury," *Batson, supra*, at 91 (emphasis added).

Holland v. Illinois, 493 U.S. ___, 107 L.Ed. 2d 905, 919 (1990) (footnote omitted). As this Court stated in *Batson*:

> [A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the *outcome" of the case* to be tried . . .

Batson, 476 U.S. at 89 (quoting *United States v. Robinson*, 421 F.Supp. 467, 473 (D.Conn. 1976), *mandamus granted sub nom., United States v. Newman*, 549 F.2d 240 (2d Cir. 1977)) (emphasis added). There was no suggestion here that these two Latino jurors' "hesitancy" or Spanish language ability indicated that they would be partial to the defendant or unfair to the State. More importantly, as a general matter, similarly situated Spanish-speaking Latino jurors in other cases would have no inherent bias. Thus, by eliminating this reason for peremptorily challenging Latino jurors, the Court will not restrict the traditional and appropriate use of peremptory challenges.

Several State courts in following their own constitutions have required that, in *Batson*-type hearings, prosecutors cite the "specific bias" that the excluded juror is claimed to have. *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); *and see, Slappy v. State*, 503 So.2d 350, 355 (Fla. App. 1987), *aff'd*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). This serves the purpose of not only ferreting out pretextural reasons, but also of limiting peremptory challenges to eliminating juror bias which might affect case outcomes. *Batson* found that the Equal Protection Clause and the values that it embodied took precedence over the unfettered exercise of peremptory challenges. *Id.*, 476 U.S. at 98-99. These State court decisions reflect that same supremacy of constitutional values. This Court should be guided by the experience of these State courts and similarly reject the peremptory challenges at issue here because of the prosecutor's failure to articulate the "specific bias" of the jurors who were struck. Reasons unrelated to the purpose of peremptory challenges should be held to be unacceptable. The importance of a jury free from discrimination outweighs the use of peremptory challenges for any other purpose.

E. There Was A Nondiscriminatory Alternative To The Exclusion Of Latino Jurors

The concern, if real[20], raised by the prosecutor here of jurors not following the interpreter can be resolved by a nondiscriminatory alternative. See, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). This underscores the discriminatory nature of the challenges. *Id.* More importantly, under the Fourteenth Amendment Equal Protection Clause, the State cannot take ethnic based actions when there are equally effective nondiscriminatory alternatives. *City Of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L.Ed. 2d 854, 890 (1989). On this basis alone, this Court should reverse.

Concerns about Spanish language fluency can be addressed by the trial court without excluding bilingual Latino jurors. As is frequently done, the judge could instruct the jurors that if they do not agree with a translation, they can pass a note to the court to seek clarification. See, *United States v. Perez*, 658 F.2d 654, 662-663 (9th Cir. 1981); *People v. Silva*, 70 Cal.App. 3d 496, 139 Cal.Rptr. 1 (1977), *vacated on other grounds*, 20 Cal.3d 489, 143 Cal.Rptr. 212, 573 P.2d 430 (1978); *Santana*, 505 N.Y.S. 2d at 778. As clearly stated by the dissent below:

> If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no

[20] Both jurors were found by the trial court to be willing and able to follow the interpreter. A9-10. The prosecutor did not believe that a challenge for cause could be made. A9. In fact the prosecutor himself stated that he believed that "in their heart[s] they [the jurors] will try to follow [the interpreter's translation]." A3. Therefore, there is a real question of the factual basis of the challenges.

> disagreement between the translator and jurors fluent in Spanish. Surely, the majority does not intend to suggest, on the other hand, that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed. And if the prosecutor's concern is merely that the jurors may become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors.

A44 (dissenting opinion). The Equal Protection Clause is better served by allowing Latinos to sit on juries that may hear Spanish language testimony, subject to the instructions of the Court, than by excluding them. There can be no justifiable state interest in excluding Latino Spanish language speakers from juries. *Batson*.

Conclusion

This Court must act to keep the jury process open to Spanish-speaking Latino jurors. It must close the loophole in the Fourteenth Amendment created by the New York State Court of Appeals and find that the explanation given here is a per se violation of *Batson*. To do so, affects in no way the ability to obtain an impartial jury through the use of peremptory challenges. The Fourteenth Amendment requires that Latino jurors not be excluded when concerns about their adherence to the official interpretation can be addressed through nondiscriminatory court instructions.

POINT II

THE FAILURE OF THE NEW YORK COURT OF APPEALS TO INDEPENDENTLY REVIEW THE TRIAL COURT'S FINDING OF NONDISCRIMINATION REQUIRES REVERSAL

A. Where There Is A Per Se Violation Of *Batson*, There Should Be A Reversal As A Matter Of Law

As petitioner has demonstrated, the prosecutor's proffered explanation is based on national origin and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment, as a matter of law. *Batson*, 476 U.S. at 97-98. This Court has plenary authority to correct errors of federal law and should use that authority to reverse the decision of the New York State Court of Appeals.

B. Even If This Court Does Not Find A Per Se Violation, Plenary Review Is Still Required

Introduction

Even if this Court finds that there is no per se violation of the Equal Protection Clause, appellate review of trial court *Batson* decisions should be by independent plenary review. As discussed below, since 1935, this Court has consistently required independent review of claims of jury discrimination. The Court continually asserted that it was obligated to do this to protect the important democratic values at stake. That obligation extends to claims of jury discrimination under *Batson*. For without independent plenary review, *Batson* will be eviscerated.

The trial courts have the initial responsibility to insure the vitality of *Batson* by scrutinizing the totality of circumstances in order to assess not only the prosecutor's credibility, but also the race neutrality of the reasons offered. Unfortunately, there is considerable evidence that trial courts are accepting prosecutor's explanations without any probing inquiry. The appellate courts must be able to do more than defer to the these trial court decisions. They must independently evaluate the full factual circumstances established at the voir dire and then determine de novo whether, as a matter of law and fact, the prosecutor's proffers of nondiscriminatory reasons are race neutral according to Fourteenth Amendment standards. The New York State Court of Appeals failed to apply plenary de novo review and deferred entirely to the trial court. This matter must be reversed and remanded for a full and independent review.

Whatever standard of review is adopted by this Court, there must be a record which includes the facts disclosed by the trial court's probe of the prosecutor's explanation as well as the specific facts found by the trial court that led to its determination of no discrimination. At the very least, there must be a record of the voir dire. In this case there was neither. A remand first to the trial court is necessary to complete the record, and then plenary review by the New York appellate courts.

1. Plenary Review Is Required To Protect The Equal Protection Values Fundamental To Our Criminal Justice System

There is a thirty-two year history of plenary review of jury discrimination cases beginning with *Norris v. Alabama*, 294 U.S. 587 (1935) and continuing to *Whitus v. Georgia*, 385 U.S. 545 (1967).[21] *See, e.g., Pierre v. Louisiana,*

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[21] In 1977, this Court in *Castaneda v. Partida*, 430 U.S. 482 (1977), continued this line of precedents by rejecting sub

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306 U.S. 354 (1939); *Smith v. Texas*, 311 U.S. 128 (1940); *Fay v. New York*, 332 U.S. 261 (1947); *Cassell v. Texas*, 339 U.S. 282 (1950); *Avery v. Georgia*, 345 U.S. 559 (1953). The Court in these cases undertakes independent review based on the principle that:

> It is [in the Court's] province to "analyze the facts in order that the appropriate enforcement of the federal right may be assured," *Norris v. Alabama*, 294 U.S. 587, 590 (1935), and while the conclusions reached by the highest court of the state "are entitled to great respect . . . it becomes our solemn duty to make independent inquiry and determination of disputed facts . . . " *Pierre v. Louisiana*, 306 U.S. at 358 . . .

Whitus, 385 U.S. at 550.

The federal right of equal protection and the principle of nondiscrimination in the selection of jurors is fundamental to our legal system. It protects not only the defendant's right to a jury of his peers and the potential juror's right to equal treatment, but the very precepts and legitimacy of our democratic society. This Court has considered these values so central to our judicial system that it has always exercised plenary review to protect and ensure their continuing vitality. As explained by this Court in *Smith v. Texas*:

> [T]he question of [racial discrimination] decided [by the State trial and appellate court] rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to

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silentio the suggestion by the dissenting opinion that a clearly erroneous standard of review applied. *Id.*, 430 U.S. at 507 (Stewart, J., dissenting).

> appraise the evidence as it relates to this constitutional right.
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> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in light of these important principles.

Id., 311 U.S. at 130; *see, similarly, Pierre v. Louisiana*, 306 U.S. at 358.

Plenary review is not merely permitted, but is required to safeguard this right of equal protection.

> When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, this examination must be made. Otherwise, review by this Court would fail its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

Norris, 294 U.S. at 590.[22]

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[22] This Court has recognized that racial discrimination in our criminal justice system generally, and in the jury, specifically, is such an anathema to our democratic values that it cannot be countenanced even if it requires overturning the

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Independent review in jury discrimination cases by this Court has always entailed a de novo assessment of the factual evidence presented at the trial court level, as well as the inferences derived from such evidence. The totality of the circumstances and evidence are weighed, including the testimonial evidence of those responsible for selecting the petit jury venire or grand jury. For example, in *Norris*, the Alabama Supreme Court had found no discrimination in the selection of jurors for the grand jury in Jackson County, Alabama, where the defendants were indicted. The Alabama court's decision rested on the ground that even if no African American was on the jury roll, it was not established that race or color caused the omission. *Id.*, 294 U.S. at 593. The Alabama court pointed to the "high standard of qualifications for jurors and that

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conviction of a defendant for whom there was a strong showing of guilt. Thus, this Court has consistently held that discrimination in the selection of jurors cannot be harmless error. *See Vasquez v. Hillery*, 474 U.S. 254 (1986); *Rose v. Mitchell*, 443 U.S. 545, 551 & n.3 (and cases cited therein) (1979); *Cassell v. Texas*, 339 U.S. 282 (1950). Similarly, this Court indicated in *Batson* that "[i]f the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." *Id.*, 476 U.S. at 100. These decisions refusing to apply the harmless-error analysis of *Chapman v. California*, 386 U.S. 18 (1967) to jury discrimination, even discrimination in the selection of a grand jury, underscore the importance of nondiscrimination to our judicial system. Its importance obviously goes beyond just insuring impartial fact finding by the jury. *Allen v. Hardy*, 478 U.S. 255 (1986); and see, *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring in the judgment).

the jury commissioner was visited with a wide discretion" as the neutral factors causing the elimination of African American jurors. *Id.*

This Court rejected the State court's finding. In doing so, the Court explicitly assessed the testimony of the jury commissioner, and found contrary to the trial court "[t]hat testimony leads to the conclusion that these or other [African-Americans] were not excluded on account of age, or lack of esteem in the community for integrity and judgment, or because of disease or want of any other qualification." *Id.*, 294 U.S. at 595. "[T]he evidence required a different result from that reached in the state court." *Id.*, 294 U.S. at 596.

Similarly, in *Norris*, with respect to the challenge to the trial venire in Morgan County, Alabama where the defendants were tried, the Court "carefully examined the testimony of the jury commissioners upon which the state court based its decision." *Id.*, 294 U.S. at 597. A member of the jury board testified that a list was made up which included the names of all male citizens of suitable age; that African American residents were not excluded from this general list; that in compiling the jury roll he did not consider race or color; that no one was excluded for that reason; and, that he had placed on the jury roll the names of persons possessing the qualifications under the statute. *Id.*, 294 U.S. at 598. This Court, based on its own assessment of the record and the totality of the circumstances, refused to credit the testimony. *Id.*, 294 U.S. at 598, 599.

Thus, in *Norris*, this Court rejected the determination of no discrimination by the trial court in Alabama as affirmed by the Alabama Supreme Court. That determination by the Alabama courts was based in part on

their assessment of the credibility of the jury commissioners' testimony of good faith and nondiscrimination. Yet, this Court rejected those findings relying on other evidence and other testimony. *Id.*, 294 U.S. at 598-599. This pattern of judicial review continued in all the jury cases right through *Whitus* in 1967.

The equal protection values protected through plenary review in these jury discrimination decisions of this Court are the exact same values intended to be protected by this Court's decision in *Batson*. This Court in *Batson*, relying on these earlier decisions emphasized that:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice . . . Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder*, 100 U.S. at 308.

Id., 476 U.S. at 87 (citations omitted). The need to protect these critical constitutional values in the *Batson* context necessitates the same standard of independent review as has been consistently applied by this Court in its past jury discrimination cases.

Plenary federal review has traditionally been mandated by this Court when other critical constitutional values are at stake that extend beyond the rights of the immediate parties involved and that safeguard the very tenets of our democratic system. Thus, in the First Amendment context, where the public's right to receive information is as much a concern as one individual's right to speak and

another individual's right not to be libeled, the Court has recently affirmed the principle of independent review to "determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984). Similarly, the Court has affirmed the requirement of plenary review in the context of determining the voluntariness of a criminal defendant's confession because that determination turns on "whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitional means." *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

A close review of the *Norris* line of cases, the voluntariness/due process cases like *Miller v. Fenton*, and the First Amendment cases like *Bose* demonstrates that the decision to apply independent and plenary review is based on the importance of the constitutional question and the need to have continuing appellate court scrutiny to shape the law. For example in *Bose*, the Court noted:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. *Regarding certain largely factual questions in some areas of the law, the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact.*

Id., 466 U.S. at 501 n.17. The findings of jury discrimination, voluntariness, or actual malice are ultimately questions of the constitutionality of the circumstances presented, i.e., questions in which the historical or subsidiary facts are measured by a legal standard. *Cf., Maggio v. Fulford*, 462 U.S. 111, 118 (1983) (White, J., concurring). In all these settings, the Court was concerned that these findings be guided by independent appellate court review in order to shape the "law" component of the determination. Although lower court decisions on these issues contain some factual determinations of both credibility and the mental processes or intent of a witness, this Court has not left the ultimate determinations solely in the hands of the trial judge or the jury. The need for independent review was well described by the dissenting opinion below:

> [I]f our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this court in defining and protecting defendant's nascent constitutional right has been virtually surrendered at the outset. While the Trial Judge's observations of the unfolding events are of course important, there is still a significant role for this court in clearly articulating the standard and then determining the law question whether the People have satisfied that standard.

A39-40 (dissenting opinion); *see, also, People v. Johnson*, 47 Cal.3d 1194, 1285, 255 Cal.Rptr. 569, 623, 767 P.2d 1047, 1101 (1989) (Mosk, J. dissenting), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1501 (1990).

The Court's statement in footnote 21 of *Batson* that "a reviewing court ordinarily should give [the trial court's]

findings [of credibility] great deference" is entirely consistent with plenary review.[23] For example, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S.___, 105 L. Ed. 2d 562, 589 (1989) held that although credibility determinations would be reviewed under the clearly erroneous standard, the reviewing court was required to independently examine the totality of the circumstances to determine whether there had been a violation of the First Amendment.

Providing independent and plenary review of these important constitutional claims, including *Batson* claims, in no way denigrates the fact finding abilities of the trial court. Appellate courts still give deference to the trial court's findings of historical or subsidiary facts as well as credibility. However, the appellate courts independently make their own determination of the constitutionality of the circumstances at issue based on the constitutional values that are being protected. In *Batson* cases, this Court and other appellate courts need to define the parameters of what is a permissible explanation and what is not. Is the reason proffered race neutral? When is a reason not sufficiently specific? Are hunches based on things not in the record good enough? Does the prosecutor have to articulate the "specific bias" of the excluded juror? The federal courts and particularly this Court as the guardians of the Fourteenth Amendment must answer these and other questions. There is no reasoned basis to reject

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[23] To the extent footnote 21 may have meant that review of *Batson* determinations are to be reviewed solely under the clearly erroneous standard, it is pure dicta and not controlling on this Court. *Wainwright v. Witt*, 469 U.S. 412, 422 (1985).

the teachings of *Norris* and its progeny.[24] Claims of jury discrimination demand plenary review. "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in the particular case by a jury or a trial judge." *Bose*, 466 U.S. at 501.

Not only must this Court provide plenary review to protect the values of the Fourteenth Amendment, but the Constitution commands that other courts of appellate review, both state and federal, should do so as well.[25] The

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[24] As this Court stated in an analogous circumstance:

> For several reasons we think that it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines, Inc.* 398 US 375, 403, (1970). . . . nearly a half century of unwavering precedent weighs heavily against any suggestion that we now discard the settled rule in this area.

Miller v. Fenton, 474 U.S. 104, 115 (1985).

[25] See, for example, the following cases which pursuant to *Bose* hold that plenary review is mandated when a state appellate court reviews whether there was sufficient evidence at trial of "malice," "obscenity," "incitement," or the "public figure" status of the plaintiff: *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562, 568 (1986); *Brown v. Kelly Broadcasting Company*, 48 Cal.3d 711, 257 Cal.Rptr. 708, 771 P.2d 406, 429 (1989); *McCoy v. Hearst Corp.*, 42 Cal.3d 835, 231 Cal.Rptr. 518, 727 P.2d 711, 715 (1986), *cert denied*, 481 U.S. 1041 (1987); *Olson*

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New York State Court of Appeals failed in its duty under the Fourteenth Amendment to provide independent review and merely deferred to the trial court. This matter must be remanded for consideration under the appropriate standard.

2. Without Plenary Review Batson Will Be Eviscerated

Plenary review by the appellate courts is required to ensure the continuing vitality of *Batson*. The combination of: (1) the ease by which prosecutors can consciously or unconsciously evade detection for racially based peremptory challenges; and, (2) the willingness of trial courts to accept explanations of prosecutors rather than find them both racists and liars, requires that the appellate courts closely scrutinize *Batson* determinations of the trial courts.

Prosecutors and trial judges work together day after day, for long periods of time, trying case after case. They are part of the same criminal justice apparatus, often being elected by the same political parties or being appointed by the same officials. This close institutional relationship breeds a collegial familiarity if not actual

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v. State Board for Community Colleges and Occupational Education, 759 P.2d 829, 830 (Colo.App. 1988); *Costello v. Capital Cities Communications, Inc.*, 125 Ill. 2d 402, 532 N.E.2d 790, 797 (1988); *Yakubowicz v. Paramount Pictures Corporation*, 404 Mass. 624, 536 N.E.2d 1067, 1071 (1989); *City of Urbana v. Downing*, 43 Ohio St. 3d 109, 539 N.E.2d 140, 146 (1989); *Fitzpatrick v. Philadelphia Newspapers, Inc.*, 567 A.2d 684, 687 (Pa.Super. 1989); *Curran v. Philadelphia Newspapers, Inc.*, 376 Pa. Super. 508, 546 A. 2d 639, 643 (1988); *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130, 134 (R.I.), *cert. denied*, 110 S.Ct. 238 (1989).

friendship. In this setting, it may be very difficult to make a finding that a colleague is practicing racial discrimination. It is not the same as findings of discrimination by trial courts in cases involving employment or housing where the defendants are ordinarily unknown to the judge or, at the very least, not friends or colleagues.[26] This institutional relationship between state officials helps explain in part the willingness of some judges to accept without any inquiry the facially neutral explanations of prosecutors. *See, e.g, State v. Slappy*, 522 So.2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987); *People v. Hall*, 35 Cal. 3d 161, 168, 197 Cal. Rptr 71, 672 P.2d 854 (1983); *Stanley v. State*, 313 Md. 50, 542 A.2d 1267, 1281 (1988); *State v. Butler*, 731 S.W.2d 265, 269 (Mo. App. 1987); *Jackson v. Commonwealth*, 8 Va. App. 176, 380 S.E.2d 1, 6 (1989).

Appellate review is necessary to have an impartial view of the cold record facts surrounding the voir dire without any inappropriate collegial assumptions about the honesty and integrity of the prosecutor. One appellate judge candidly described the problem:

> The difficult question to answer, though, is what constitutes an adequate race-neutral explanation? How plausible must it be? How much in-depth explanation must the prosecutor give in order to support his race-neutral explanation? How particular must his reason be? Must the prosecutor's reason amount to something more than a suspicion or hunch that the prospective juror will not be a fair juror to his side? If the prosecutor gives a racially neutral explanation,

[26] Also, unlike testimony at trial, prosecutors are often not under oath when they offer their responses to a prima facie case.

> such as one of the above reasons ["Because he was the same age as the defendant"] or the one given in this cause, and the trial judge believes him, will that, standing alone, be sufficient? If that is the law, excepting the situation where the prosecutor admits on the record that he was racially motivated when he exercised his peremptory strikes . . . I believe that, much like this Court's records reflect the number of times a trial judge has disbelieved a law enforcement official concerning the admissability of a defendant's confession, *it will be the rare case where the trial judge disbelieves a prosecuting attorney and finds that the prosecutor failed to overcome the defendant's prima facie case of racial discrimination* . . .

Keeton, 749 S.W.2d at 878-879 (concurring opinion) (citation omitted and emphasis added); *see, also, People v. Johnson*, 47 Cal.3d at 1291, 255 Cal.Rptr. at 627, 767 P.2d at 1105. (Mosk, J., dissenting).

This Court has recognized the reluctance of familiar institutional actors to find fault with those with whom they work. In *Rose v. Mitchell*, this court stated:

> Federal habeas corpus review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system. There is strong reason to believe that federal review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective.

Id., 443 U.S. at 563.

Plenary review is especially needed here where the prosecutor's reason is integrally related to national origin. As the dissenting judges stated below, there must be

heightened scrutiny for reasons of this type. The prosecutor's assertions must be carefully examined in light of all the factual circumstances in the voir dire. "[A] reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be accepted." A41 (dissenting opinion).[27]

Already many commentators are confirming Justice Marshall's prediction that "[a]ny prosecutor can easily assert feasibly neutral reasons for striking a juror" and therefore "the protection erected by the [*Batson* opinion] may be illusory." *Batson*, 476 U.S. at 106 (Marshall, J. concurring). *See, e.g.*, Stewart, *Court Rules Against Jury Selection Based on Race*, 72 ABAJ 68, 70 (July, 1986) ("[A]ny prosecutor's office could develop a list of 10 or 15 standard reasons for striking a juror: the juror was 'inattentive' or dressed poorly and thus 'did not seem to respect the system of justice' "); Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 173-176 (1989); Note, *Rebutting the Inference of Purposeful Discrimination In Jury Selection Under Batson v. Kentucky*, 57 UMKC L. Rev. 355, 360 (1989); Note, *Batson v. Kentucky: Two Years Later*, 24 Tulsa L.J. 63, 85 (1988). Proffers of arbitrary and meaningless neutral explanations have been accepted because of the lack of sufficiently objective criteria. As stated by one commentator:

> A black who wishes to serve on a jury must be careful to look directly at the prosecutor. The Fifth Circuit has upheld an exclusion primarily

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[27] While petitioner believes that there is a per se violation of *Batson*, alternatively, this court can find a violation for the reasons urged by the dissent below.

> on a prospective juror's failure to maintain eye contact. The prospective juror must not look too much, however. The Seventh Circuit has upheld an exclusion that a prosecutor explained by saying "Mr. Declinton [sic, Declinton was the prospective juror's first name] was sitting directly to my right, only a space of approximately four feet from me, and both yesterday and today he spent a very great deal of time in examining me in a way which I felt was in the end becoming rather hostile."
>
> Courts have upheld exclusions grounded on a prospective juror's "posture and demeanor," "poor attitude in answering voir dire questions," "nodding . . . a little bit too much toward [defense counsel] and not enough towards me," "demeanor and how he answered the questions," and even exuding "something [that] seemed unfavorable."

Alschuler, 56 U. Chi. L. Rev. at 175-176 (citations omitted).

Judge Higginbotham of the United States Court of Appeals for the Third Circuit has similarly observed:

> Justice Marshall predicted in his *Batson* concurrence that the decision would allow courts to remedy only the most flagrant instances of racial discrimination in jury selection. 476 U.S. at 105, 106 S.Ct. at 1727 (Marshall, J., concurring). Time and experience have proved him correct. Recent commentators note that *Batson* has left prosecutors free to strike jurors based on what amounts to patent stereotypes. *See, e.g.*, Serr and Manly, *Racism Peremptory Challenges and the Democratic Jury*, 79 J.Crim.Law & Criminology 1, 43-47 (1988); Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U.Pa.L.Rev. 1365, 1420 (1987) (prosecutor may seek to justify strike on arbitrary grounds such as speech, hair style, demeanor).

United States v. Clemons, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring), *cert. denied*, 110 S.Ct. 2623 (1990).

Objectively verifiable measures of race neutrality must be considered by the trial court and be independently reviewable by the appellate courts. Otherwise, prosecutors' proffers which are the functional equivalent of good faith assertions will continue to be sufficient to overcome a prima facie case. This may be the only way to prevent the unconscious, but discriminatory operation of the jury selection system. *Batson*, 476 U.S. 106-107 (Marshall, J. concurring);[28] *United States v. Clemons*, 892 F.2d at

[28] As explained by Justice Marshall:

"[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King* [v. *County of Nassau*, 581 F. Supp. 493, 502 (E.D.N.Y. 1984)]. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. [citations omitted] Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels – a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and

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1162 (Higginbotham, J., concurring); *see also*, Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 Yale L.J. 187, 198-199 (1989); *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1581 (1988); *see generally*, Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

Appellate review should look beyond the mere assertions of nondiscrimination and examine the available objective facts to determine whether as a matter of law and fact the exclusion of a juror was based on race neutral criteria. The State courts have already begun to lay out some of the criteria for determining whether discrimination exists. For example, the Alabama Supreme Court recently listed several factors that may lead to a finding of discrimination:

1. The reasons given are not related to the facts of the case.
2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.
3. Disparate treatment – persons with the same or similar characteristics as the challenged juror were not struck.
4. Disparate examination of members of the venire, e.g., a question designed to provoke a certain response that is likely to disqualify the

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other forms of discrimination remain a fact of life, in the administration of justice as in our society as a whole." *Rose v. L. Mitchell*, 443 U.S. 545, 558-559, 61 Ed. 2d 739, 99 S.Ct. 2993 (1979), quoted in *Vasquez v. Hillery*, 474 U.S. 254, 264, 88 L.Ed.2d 598, 106 S.Ct. 617 (1986).

Batson, 476 U.S. 106-107 (Marshall, J. concurring).

juror was asked to black jurors, but not to white jurors.

5. The prosecutor, having 6 preemptory challenges, used 2 to remove the only 2 blacks remaining on the venire.

6. "[A]n explanation based on a group bias where the group trait is not shown to apply to the juror specifically." *Slappy*, 503 So.2d at 355. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potential liberal nature of the challenged juror.

Ex Parte Branch, 526 So.2d 609, 624 (Ala. 1987) (citations omitted); *see similarly, Keeton v. State*, 749 S.W.2d 861, 868 (Tex.Cr.App. 1988) (en banc); *State v. Slappy*, 522 So.2d at 22.

Plenary review may not be able to catch all the conscious and unconscious racially based peremptory challenges, but without it, there is no hope of *Batson* ever being a bar to discrimination. While trial courts can be relied on to catch many of the more flagrant violations of *Batson*, there is a need for independent review by the appellate courts. The appellate courts must set the standards which will deter trial courts from accepting prosecutors' explanations without any probing inquiry into those explanations because of their own unconscious racism or feelings of collegiality. When appellate review finds that race or ethnicity is more likely than not the basis of a prosecutor's peremptory challenge, even if the trial court found otherwise, the Equal Protection Clause requires that there be a reversal and new trial. It is only through this form of independent review that the standards for *Batson* can be properly set and enforced.

3. There Must Be An Adequate Record

In order for there to be plenary review there must be an adequate record. This requires (1) that the trial court probe the prosecutor's explanation; and, (2) that the trial court record the specific factual findings that underlie its conclusion of nondiscrimination. Absent a probing inquiry by the trial court and a record of its findings, there must be a transcript of the voir dire to allow for appellate review. Here, there was neither a voir dire record nor specific factual findings; appellate review under any standard was not possible. But, plenary review was particularly impossible.

The trial court cannot simply accept on its face the explanation of the prosecutor. The Alabama Supreme Court described the duty of the trial court to probe the explanation as follows:

> The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, . . . the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination. . . . This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding.

Ex Parte Branch, 526 So.2d at 624 (citations omitted); *see also, State v. Slappy*, and cases cited thereafter on page 39

The trial court has an obligation independent of the defendant to insure nondiscrimination.[29] *Batson*

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[29] The prosecutor has an equal duty to substantiate on the record the factual bases of the peremptory challenges. *People v. Johnson*, 47 Cal.3d at 1287, 255 Cal.Rptr. at 625, 767 P.2d at 1103 (Mosk, J., dissenting); and see dissenting opinion below at A41-42.

recognized, as did the earlier jury discrimination cases, that the integrity of the judiciary is at risk if discrimination is allowed to be practiced.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Id., 476 U.S. at 87 (citations omitted).

Here, perhaps because the trial took place only a few months after *Batson* was decided, the trial court failed in its constitutional duty to probe the explanation of the prosecutor. There was no consideration of the factors that might lead to a finding of discrimination based on pretext. As the dissent below noted, the record does not indicate whether non-Latinos were questioned about their Spanish language ability. A42. Nor did the trial court's determination reflect whether non-Latinos who "hesitantly" answered other questions regarding their obligations as jurors were also struck. These factual inquiries are basic to the ability of the appellate court to review a finding of nondiscrimination. The matter should be remanded to allow the trial court to fully probe the prosecutor's reasons, consider the factors listed by the Alabama court in *Ex Parte Branch* and record its findings. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-293 (1982).

Courts, both State and Federal, consistently require that there be record support for the trial court's determination. *See, e.g., Jackson*, 380 S.E.2d at 6 ("The record must contain findings by a trial judge, not just a conclusion, in order to facilitate both the initial inquiry and appellate review."); *Stanley*, 542 A.2d at 1277, n.11 ("We

emphasize here the need for the record to contain not only specific findings by the judge, but also information to support those findings; information such as the number of blacks and whites on the venire, the numbers of each stricken for various reasons, the reasons underlying strikes for cause, pertinent characteristics of jurors excluded and retained, relevant information about the race of the defendant, the victim and potential witnesses, and so forth."); *Tolbert v. State*, 315 Md. 13, 553 A.2d 228, 233, n.8 (1989); and, *see*, 28 U.S.C. 753 (requiring that the court reporter in criminal cases record all phases of jury selection, including voir dire). Here, no specific findings were made, nor was there a transcript of the voir dire. The absence of a record requires a remand. *Cf., Hardy v. United States*, 375 U.S. 277 (1964).

Conclusion

Plenary review is mandated by the Fourteenth Amendment. The failure of the New York State Court of Appeals to provide plenary review requires that this matter be remanded back to the New York courts to complete the record and review it properly under the appropriate standard.

CONCLUSION

The decision below should be reversed and a finding of a per se violation of the Fourteenth Amendment should be entered. Alternatively, this matter should be remanded to the New York courts to complete the record and provide a full plenary review of the trial court's determination.

Dated: November 28, 1990

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he was afraid that they might not abide by official translations of Spanish language testimony constituted an acceptable "race neutral" explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986).

2. What is the standard of review an appellate court should apply when reviewing a trial court's acceptance of the prosecutor's reason as race neutral.

LIST OF PARTIES

The petitioner is Dionisio Hernandez. The respondent is the State of New York, represented in this criminal prosecution by Kings County District Attorney Charles J. Hynes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DIONISIO HERNANDEZ,

Petitioner,

—against—

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New York Supreme Court, Appellate Division, Second Department (Joint App. at 24-25) is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988). The opinion of the trial court (Joint App. at 8-12) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals was rendered on February 22, 1990. The petition for certiorari was filed on May 23, 1990 and was granted on October 6, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 8, 1985, petitioner Dionisio Hernandez [hereafter referred to as defendant] chased Charlene Calloway down a street in Brooklyn, New York and shot her twice with a .38 caliber revolver, severing two vertebrae in her neck. Defendant then fired his revolver at Ms. Calloway's mother, Ada Saline, but missed her, hitting instead two men inside a nearby building. Immediately after the shooting, defendant's revolver was recovered from the ground, and a fully-loaded .25 caliber pistol was found in a holster on his leg. Ms. Calloway's injuries were life-threatening, but she and the other victims recovered. Kings County Indictment Number 7649/1985 charged defendant with Attempted Murder in the Second Degree (two counts) and other lesser crimes.

In November 1986, the case was tried before a jury. During jury selection, defendant moved for a mistrial following the prosecutor's use of peremptory challenges to strike four prospective jurors, whom defendant identified as Latino. Without waiting for a ruling on whether defendant had established a *prima facie* case of discrimination, the prosecutor explained that he had challenged two of the jurors because each had a brother who had been convicted of a crime. He challenged the two other potential jurors because a critical prosecution witness in this case was expected to testify in Spanish, and the jurors had said during the *voir dire* that their fluency in Spanish might make it difficult for them to accept the official English interpretation of testimony to be given in Spanish. The trial court found that the prosecutor's explanations were not based on race, were supported by the *voir dire*, and were not pretextual. It therefore denied defendant's mistrial motion.

At the conclusion of the trial, defendant was convicted of two counts of attempted murder and two counts of criminal possession of a weapon. On appeal, the New York Supreme Court, Appellate Division, Second Department, affirmed the judgment of conviction, finding that the prosecutor's reasons for the peremptory challenges were race-neutral and that their validity was supported by the record. On further appeal, the New York Court of Appeals affirmed and ruled that the record-based reason advanced by the prosecutor to support the peremptory challenges of the Spanish-speaking jurors was race-neutral and did not appear as a matter of law to be pretextual. Defendant challenges that determination.

The Jury Selection and Mistrial Motion

The *voir dire* in this case took place in November 1986, approximately six months after this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Neither the questioning of the potential jurors nor the exercise of peremptory challenges was recorded. The record contains colloquy on requests to challenge specific potential jurors for cause and argument on motions made during jury selection. In addition, the trial court kept a list of the names of the potential jurors who were questioned during *voir dire*, on which it recorded whether each potential juror was dismissed by the court, on consent, for cause, or by peremptory challenge, or was seated on the jury. This list does not indicate the race or national origin of the potential jurors.

At the end of the fourth round of *voir dire*, after 63 potential jurors had been questioned and nine jurors had been empaneled, defendant challenged the prosecutor's use of peremptory challenges to strike four potential jurors whom defendant identified as Latino.[1] Defense counsel claimed that

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1 Defendant does not question the challenge of the two jurors whose immediate family members had been convicted of crimes.

the prosecutor had removed every Latino from the venire and asserted that the prosecutor had no real reason to challenge any of them. Counsel did not argue that the prosecutor's peremptory challenges violated the Constitution. Nor did he cite to *Batson*; he claimed only that the prosecutor had violated an internal policy of the Kings County District Attorney's Office. Counsel stated that this policy had been expressed in an article published in the New York Law Journal, reporting that Assistant District Attorneys in Kings County were not permitted to challenge African-American, Latino, or other minority jurors on the basis of race.[2]

Without waiting for the trial court to rule on whether defendant had made out a *prima facie* case, the prosecutor offered his reason for challenging two jurors in the fourth round, who were later identified as Lydia Mikus[3] and Ismael Gonzalez. The prosecutor explained that he did not know if both of the jurors were Latino, but had challenged them because they had each given him reason to believe that they would have difficulty accepting the official court interpreter's translation of the testimony of Spanish-speaking witnesses, as opposed to relying on their own understanding of the Spanish-language testimony.

The prosecutor stated that during a lengthy series of questions posed by the court and the prosecutor, both jurors had

2 In fact, the District Attorney's policy precluding racial discrimination in jury selection was implemented before this Court decided *Batson*. The Kings County District Attorney's Office argued in briefs to the New York Court of Appeals, the Second Circuit Court of Appeals, and in an *amicus* brief in *Batson* that the exercise of peremptory challenges on the basis of race violated the New York State and Federal Constitutions. *See* Brief for Respondent, *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441, *cert. denied*, 461 U.S. 961 (1982); Brief for Respondent, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 447 U.S. 1001 (1986); Brief for District Attorney of Kings County as *Amicus Curiae*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

3 The court reporter phonetically transcribed Mikus' name as "Mico" and "Micous" during the *voir dire*. However, "Mikus" is used in this brief because it is the spelling that appears to be written on the court's jury challenge sheet (Joint App. at 12).

equivocated about their ability to accept as final and authoritative the official English translation of testimony given in Spanish. He noted that, "[w]e talked to them for a long time; the Court talked to them, I talked to them." When asked if they could accept the interpreter's version of the testimony, both jurors looked away from the prosecutor and "said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter." The jurors' equivocal answers caused the prosecutor to believe that "they would be hard pressed to accept what the interpreter said as the final thing on what the record would be." To clarify their responses, the prosecutor asked the court to question the jurors further. Although both jurors ultimately answered that they could accept the translation as final, "they both indicated that they would have trouble," and the prosecutor "felt from the hesitancy of their answers and their lack of eye contact, that they would not be able to do it."

The prosecutor explained that testimony given in Spanish was very important in this case because several critical witnesses, including the chief prosecution witness, Ada Saline, were expected to testify through a Spanish-language interpreter. The prosecutor was concerned that, given the importance of the anticipated Spanish-language testimony, jurors who interpreted for themselves rather than relying on the official interpreter's translation "would have an undue influence on the jury" during deliberations.

The prosecutor also argued that any race-related motivation an attorney might have for excluding Latinos from the jury was negated in this case because all of the parties involved, including the four victims and the civilian prosecution witnesses, were Latino. Defense counsel responded that the prosecutor did not want Latinos on the jury because of the fear that they would sympathize with defendant.

The court credited the prosecutor's reasoning, noting as an aside that Latino jurors "might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter."

Defense counsel then argued that the prosecutor's peremptory challenges to the two jurors were improper because both had said, in response to the trial court's inquiry, that they could render a fair and impartial verdict. Counsel noted that the prosecutor had refused to consent to defendant's cause challenges to several jurors who were related to police officers but who had indicated that they could fairly evaluate police testimony. The prosecutor explained that he had treated all jurors the same; because the Spanish-speaking jurors had stated that they could be fair, he did not believe that it was appropriate to challenge them for cause either. He had, however, consented to cause challenges to any juror who had stated that he or she could not be fair, including at least one person related to a police officer.

Finally, defense counsel claimed that the prosecutor had challenged the two jurors in order to force defendant to accept a juror whose son was a police officer, noting that the next two prospective jurors had police officer sons and defendant had only one peremptory challenge remaining. Defense counsel argued that "[w]e can't possibly get a fair trial if that condition is going to continue here . . . because I'm going to get caught here with two women whose sons are cops, they're not going to do me any good anywhere."

Defendant offered no evidence to challenge the factual accuracy of the prosecutor's characterization of the jurors' answers and demeanor when questioned about their ability to decide the case based on the official English translation of testimony given in Spanish. Nor did he argue that the prosecutor had misunderstood the jurors' failure to make eye contact. Defendant did not advance the theory, which he raised for the first time on appeal, that the jurors' hesitancy or equivocal answers were simply the natural consequence of their language fluency and therefore that the prosecutor's challenges, even if genuine, were not race-neutral as a matter of law. Nor did he suggest that instructing the jurors to communicate any disagreement with the official interpretation to the court could effectively address the prosecutor's concern

that all jurors rely on the same version of the testimony when deciding the case.

The court found that the prosecutor's explanation for his challenges of the two Spanish-speaking jurors was both nonpretextual and supported by the record of the *voir dire*. Based on the *voir dire* and the argument on the motion, the court denied defendant's mistrial motion and expressly rejected the claim that the prosecutor had sought to exclude Latino jurors because of their ethnicity.

The Trial and Sentence

Following jury selection, the case proceeded to trial. While the jury did not hear from Mrs. Saline, whom the prosecution had expected throughout jury selection would be one of its witnesses,[4] another witness, Freddy Nieves did testify through a Spanish-language interpreter. On November 17, 1986, the jury found defendant guilty of two counts of Attempted Murder in the Second Degree (N.Y. Penal Law §§ 110.00/125.25[1]), Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03), and Criminal Possession of a Weapon in the Third Degree (N.Y. Penal Law § 265.02[4]). On January 30, 1987, the court sentenced defendant to concurrent terms of imprisonment of four to twelve years for each attempted murder count, one and one-third to four years for second-degree weapon possession, and one to three years for third-degree weapon possession.

The Appeals

The New York Supreme Court, Appellate Division, Second Department, affirmed the judgment of conviction in an opinion dated May 16, 1988. The Appellate Division, which has

4 Mrs. Saline cooperated until the jury selection process was completed, and was expected to testify for the prosecution, but fled to Puerto Rico with Ms. Calloway on the day testimony was to begin. Even though his wife was allegedly visiting relatives, defendant claimed that he did not know where in Puerto Rico she and her mother were staying.

factfinding power, N.Y. Crim. Proc. Law § 470.15(1), unanimously rejected defendant's claim that the prosecutor had exercised his peremptory challenges on the basis of race. *People v. Hernandez*, 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988). Although it determined that defendant had made out a *prima facie* case of discrimination, the Appellate Division found that the prosecutor's reason for challenging the two jurors was sufficient to satisfy the prosecutor's burden of coming forward with non-discriminatory reasons for his challenges in order to rebut the *prima facie* showing. 140 A.D.2d at 543, 528 N.Y.S.2d at 626.[5] The court found that the two jurors "were challenged because they both spoke Spanish and indicated during the voir dire that they might have difficulty accepting as final and authoritative the court interpreter's translation of the testimony." 140 A.D.2d at 543, 528 N.Y.S.2d at 626.

On appeal to the New York Court of Appeals, defendant argued for the first time that the prosecutor's genuine, record-supported belief in the inability of the two Spanish-speaking jurors to accept the official English translation of the testimony was, as a matter of law, an impermissible basis for a peremptory challenge. In support of that position, defendant claimed that the jurors' hesitancy about their ability to accept the official translation was grounded in their knowledge of Spanish, a factor so inextricably intertwined with Latino identity that the prosecutor's actions were tantamount to challenges based on ethnicity.

In an opinion dated February 22, 1990, the Court of Appeals affirmed the order of the Appellate Division and rejected defendant's claim that the prosecutor's reason was a *per se* violation of *Batson*, ruling that:

> These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony. So it cannot be, as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic identity factor alone determines this case.

People v. Hernandez, 75 N.Y.2d 350, 356, 552 N.E.2d 621, 623, 553 N.Y.S.2d 85, 87 (1990).

The court carefully analyzed defendant's claims pursuant to the *Batson* framework which, the court noted, "abandoned the prosecutorially weighted evidentiary tilt of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, and imposed a new and important calculus." 75 N.Y.2d at 355, 552 N.E.2d at 623, 553 N.Y.S.2d at 87. The court ruled that the inability or unwillingness of the two Spanish-speaking jurors to accept the evidence properly submitted to them by the court was a legitimate neutral ground for exercising a peremptory challenge, holding that "[h]esitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges." 75 N.Y.2d at 356, 357-58, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88. The court held that because the prosecutor's reason for the challenges was race-neutral on its face, it was the trial court's duty to determine whether it was pretextual or real and whether it was justified by the answers and conduct of the challenged jurors during *voir dire* in this case. 75 N.Y.2d at 356-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88.

Relying on this Court's holding in *Batson*, 476 U.S. at 98 n.21, the New York Court of Appeals ruled that the resolution of these factual issues by both lower courts was entitled to "great deference" on appeal. The court examined the record with care and stated that there was no basis in law or policy to conclude that the lower courts had erred in these determinations. 75 N.Y.2d at 356-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88. The court held that

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5 The Appellate Division also found that the Latino origin of one of the two Spanish-speaking jurors was "questionable." 140 A.D.2d at 543, 528 N.Y.S.2d at 625.

> the prosecution documented its belief on the jurors' statements and on doubt-raising body language descriptions (e.g., averted eyes and gazes on being questioned on the critical points) developed during an extensive voir dire and placed [that documentation] on the record before the Trial Justice, who was also present at the entire voir dire. The record-based beliefs, advanced to satisfy its *Batson*-based burden, do not appear to us as a matter of law and did not appear to the lower courts as a matter of fact to be some facial facade. If the court was not satisfied with the adequacy of this explanation after watching and listening to the proceedings, of course it could have conducted a further voir dire.

75 N.Y.2d at 356-57, 552 N.E.2d at 624, 553 N.Y.S.2d at 88. But it warned that "pretextual maneuvering or less verifiable manifestations of a juror's attitudes about adhering to governing instructions will not satisfy the prosecution's burden." 75 N.Y.2d at 358, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

The two dissenting judges argued, primarily as a matter of state law, 75 N.Y.2d at 360-61, 552 N.E.2d at 626-27, 553 N.Y.S.2d at 90-91, that a facially neutral explanation by a prosecutor that may nonetheless have a disparate impact on members of a defendant's racial group is "inherently suspect" and must be subjected to some kind of enhanced scrutiny. 75 N.Y.2d at 363, 552 N.E.2d at 628, 553 N.Y.S.2d at 92. The dissent did not explain how that scrutiny differed from the procedures required by *Batson*.

Apparently placing the ultimate burden of proof on the prosecutor, the dissent argued that the prosecutor had made an insufficient evidentiary record to meet this "enhanced" standard of scrutiny because the two jurors had ultimately assured the trial court that they would accept the official translation, and the prosecutor had failed to establish that any other members of the panel had also been asked if they spoke Spanish. 75 N.Y.2d at 362-63, 552 N.E.2d at 627-28, 553 N.Y.S.2d at 91-92. The dissent did not contend that the prosecutor's reason for challenging these jurors was a *per se*

Batson violation, but rather concluded that, on this record, the prosecutor's "subjective impression (based on lack of eye contact) of the sincerity of the jurors' assurances that they would accept the interpreter's version of what the witnesses said" was nothing more than an intuitive judgment deriving from the jurors' heritage. 75 N.Y.2d at 364, 552 N.E.2d at 628, 553 N.Y.S.2d at 92.

This Court granted defendant's petition for a writ of certiorari by an order entered on October 6, 1990. *Hernandez v. New York*, 111 S. Ct. 243 (1990).

SUMMARY OF ARGUMENT

This case, contrary to defendant's contention, does not involve discrimination on the basis of language or national origin. The record demonstrates that the peremptory challenges at issue here were motivated by the prosecutor's concern, developed by the questions and answers during *voir dire*, that two individual prospective jurors might not be able to decide the case based on the evidence available to the remainder of the jury. The prosecutor did not challenge the jurors because they were Latino or because he assumed that all Spanish-speaking jurors would be unable to decide fairly a case involving testimony in Spanish—an untenable assumption both contrary to the notion that jurors are to be treated as individuals, and forbidden by the policy of the Kings County District Attorney. Rather, he challenged them because these particular jurors indicated they might have difficulty deciding this case solely upon the admissible evidence.

The prosecutor's reason for challenging the jurors was, irrefutably, related to the case on trial and articulated with sufficient specificity to be reviewed by the courts. The genuineness of that reason, as the state appellate courts properly found, is demonstrated by the record and is largely unquestioned by defendant in this case. Thus, the prosecutor's reason for exercising the peremptory challenges was legitimate and race-neutral under settled principles of equal protection

law. *See Batson*, 476 U.S. at 97-98; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Defendant's argument that the prosecutor's reason nonetheless represented a *per se* violation of *Batson* is fundamentally flawed. Defendant's statistical analysis fails to support his assumption that all Latino jurors will express the same equivocation as did the jurors in this case. Moreover, his analysis ignores the intent-driven inquiry mandated by the Equal Protection Clause. *Batson* does not prohibit a prosecutor's reliance on an otherwise race-neutral ground for the exercise of a peremptory challenge simply because of an asserted disparate impact, or simply because the prospective juror has made problematic comments for reasons that are related to the juror's race, ethnicity, or national origin. The Equal Protection Clause only prohibits purposeful discrimination by the prosecutor. *Batson*, 476 U.S. at 93.

The appellate courts in New York also fulfilled their responsibilities under the Equal Protection Clause. In express reliance on the *Batson* framework, the courts first determined that the prosecutor's reason was neutral on its face, and then carefully reviewed the entire record of the *voir dire*, giving appropriate deference to the trial court's factual determinations, and concluded that defendant had not met his burden of establishing purposeful discrimination in this case. Contrary to defendant's claim that appellate courts must review the factual determinations *de novo*, the traditional equal protection analysis adopted by this Court accords such determinations deference on appeal, to be reversed only if clearly erroneous. *Batson*, 476 U.S. at 98 n.21; *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

Defendant has offered no justification for the application of a new standard of appellate review in *Batson* cases. Because the New York courts properly ruled that the prosecutor's reason for challenging these jurors was race-neutral and sufficient to rebut defendant's *prima facie* showing of discriminatory intent, the decision below should be affirmed.

POINT I

A PROSPECTIVE JUROR'S HESITANCY TO ABIDE BY THE OFFICIAL TRANSLATION OF SPANISH LANGUAGE TESTIMONY, DEMONSTRATED ON THE RECORD, IS A LEGITIMATE, RACIALLY NEUTRAL REASON FOR THE EXERCISE OF A PEREMPTORY CHALLENGE.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court reaffirmed that the prosecution's exercise of peremptory challenges is limited by the core guarantee of the Equal Protection Clause that the state not discriminate against any citizen on the basis of race:

> Although a prosecutor ordinarily is entitled to exercise peremptory challenges 'for any reason at all, so long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

476 U.S. at 89 (citations omitted). To implement that holding, this Court requires the prosecutor to explain the basis for peremptory challenges once the defense meets its burden of establishing a *prima facie* case that the prosecutor's challenges were motivated by racial discrimination. The prosecutor's reason must be race-neutral, related to the case to be tried, and legitimate. *Batson*, 476 U.S. at 97-98, 98 n.20 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 [1981]). This Court emphasized, however, both that the prosecutor's reason need not rise to the level of a challenge for cause, *Batson*, 476 U.S. at 97, and that, as with all other persons claiming an equal protection violation, the defendant must establish purposeful discrimination in order to prevail. *Batson*, 476 U.S. at 93.

A prosecutor cannot rebut a *prima facie* case of discrimination in jury selection simply by relying on racial stereotypes or assumptions, or by denying any discriminatory motive. *Batson*, 476 U.S. at 97-98. Instead, the prosecutor must give "trial-related reasons for his strikes—some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant." *Batson*, 476 U.S. at 101-02 (White, J., concurring). The "central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Holland v. Illinois*, 110 S. Ct. 803, 825 (1990) (Stevens, J., dissenting).[6] Thus, a prosecutor cannot use peremptory challenges "to exclude Afro-American prospective jurors on the ground that they, as a class, lack the intelligence or impartiality to fill the jurors' role." *Holland*, 110 S. Ct. at 819 (Marshall, J., dissenting).

The evil that the Constitution prohibits is the exclusion from jury service of individuals "not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background." *Lockhart v. McCree*, 476 U.S. 162, 175 (1986). *Batson*, however, was not intended to bar the exclusion of persons who, because of a specific trait or ability, give reason

6 While *Holland* was brought as a Sixth Amendment fair cross-section case, much of its discussion of racial neutrality relies on the *Batson* analysis. In defining the State's obligation of neutrality in jury selection, Justice Stevens noted:

> The Sixth Amendment does not forbid the State from removing jurors on the basis of partiality or other *relevant* individual characteristics. Even if the prosecutor's peremptory challenges based on such considerations, when aggregated, could be considered to result in the exclusion of a 'cognizable group,' that group by definition would be one that is ineligible for jury service for legitimate state reasons. . . . [However,] the State may not remove jurors for unconstitutional reasons or reasons relevant only to eliminating a group from the community eligible for jury service. That is, the State may not remove jurors solely on account of race.

110 S. Ct. at 828 n.16 (Stevens, J., dissenting) (emphasis in original).

to believe that they may be unable to serve fairly as jurors in a particular case. *See McCray v. Abrams*, 750 F.2d 1113, 1132 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 478 U.S. 1001 (1986).

In this case, the prosecutor set forth a race-neutral reason for his peremptory challenges against the two Spanish-speaking jurors, and the New York courts found his reason to be genuine. The trial court and both state appellate courts concluded—and the record reflects—that these jurors "were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony." *People v. Hernandez*, 75 N.Y.2d 350, 356, 552 N.E.2d 621, 623, 553 N.Y.S.2d 85, 87 (1990). The challenges "pertained to the individual qualities of [each] prospective juror and not to that juror's group association." *Commonwealth v. Soares*, 377 Mass. 461, 491, 387 N.E.2d 499, 517, *cert. denied*, 444 U.S. 881 (1979). The difficulty expressed by the jurors implicated two related concerns: their ability to follow the trial court's instructions to accept the official interpretation and to decide the case upon the evidence available to their fellow jurors; and the fear that these jurors might act as unsworn witnesses and have an improper influence on their fellow jurors.

The prosecutor did not base his challenges on any assumptions about the ability of Spanish-speaking jurors as a group to serve in this case (or even on speculation, intuition or hunch). Nor did he challenge the jurors simply because they spoke Spanish.[7] Rather, he relied on the answers actually

7 There is some support for the view that language discrimination violates the Equal Protection Clause, *compare Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 109 S. Ct. 1736 (1989) *with Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) *and Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (violation of due process to criminalize teaching any language but English). The Kings County Dis-

given by individual Spanish-speaking jurors and on their demeanor when they gave those answers.

At trial, defendant did not challenge the fact that the jurors equivocated. He now argues that reliance on that equivocation is not race-neutral but is a "*per se* violation of *Batson*," because the source of the jurors' equivocation is derived from their ethnicity (Brief for Petitioner at 11-12). This argument is contrary to the logic of *Batson* and to the principles of equal protection law upon which *Batson* squarely rests. It, therefore, should be rejected.

A. A Juror's Hesitancy to Adhere to the Official Translation, Demonstrated On the Record, is a Race-Neutral Reason for the Exercise of a Peremptory Challenge.

One of the primary goals of jury selection is to identify those prospective jurors who may not decide the case based solely on an application of the trial court's legal instructions to the evidence presented at trial. "[T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). Contrary to defendant's implication (Brief for Petitioner at 24-25), bias against one side or the other is not the only problem that *voir dire* and the exercise of peremptory and cause challenges are designed to prevent. As this Court observed in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Batson* prohibits the racially motivated exercise of challenges; it does not command prosecutors to accept jurors whose *voir dire* responses indicate that they might not be able to fulfill this obligation.[8]

trict Attorney views language discrimination in jury selection as offensive and does not permit the exercise of peremptory challenges on that basis. In any event, this case does not call upon the Court to resolve the constitutional issue raised by such discrimination.

It would disserve both the principles of *Batson* and the goal of fair trials to prohibit any challenge to individual jurors who indicate during *voir dire* that they will, or might, be unable to accept the official translation of testimony, or who are reluctant to do so. Just as jurors are not permitted to be unsworn witnesses, *see Parker v. Gladden*, 385 U.S. 363 (1966), or to rely on their own personal knowledge of the facts, the law, or the witnesses, *see Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961), it is crucial to a fair trial that the entire jury hear the same evidence and base its deliberations on that evidence, rather than on each juror's personal translation of the testimony.

Similarly, under *Batson*, it is not improper to challenge a potential juror with opinions contrary to the law, such as a juror who has reservations about the death penalty, *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989); *People v. Sanders*, 51 Cal.3d 471, 273 Cal. Rptr. 537, 797 P.2d 561 (1990) (en banc); who may be unable fairly to consider tape-recorded evidence, *United States v. Mathews*, 803 F.2d 325, 330-31 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988); who has reservations about judging another human being, *United States v. Mitchell*, 886 F.2d 667 (4th Cir. 1989); or whose prior contacts with law enforcement make him "equivocal on his ability to be fair and impartial," *State v. Howard*, 789 S.W.2d 191 (Mo. App. 1990). As one commen-

8 As this Court made clear in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), the Equal Protection Clause does not prevent a state from "prescribing the qualifications of its jurors, and in so doing to make discriminations," so long as the discriminations are not based on race or other impermissible criteria. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 1784-85 (1989). In New York, like most states, a juror is disqualified from service if he "is of a state of mind that is likely to prevent him from rendering an impartial verdict based upon the evidence adduced at trial." *See* N.Y. Crim. Proc. Law § 270.20(1)(b). Therefore, any belief or ability of a juror that could interfere with an impartial review of the admissible evidence as defined by the court is a legitimate basis for challenging that juror.

tator recently noted, "[c]ourts properly have held that there is nothing discriminatory about challenging jurors who express doubts concerning their ability to be fair or who do not appear to understand legal rules." Raphael, *Discriminatory Jury Selection: Lower Court's Implementation of Batson v. Kentucky*, 25 Willamette L. Rev. 293, 320 (1989).

In *Mathews*, 803 F.2d at 330-31, the prosecutor challenged an African-American juror who gave "particularly hesitant responses to the judge's inquiry" regarding her ability to evaluate and accept covertly-taped evidence. The Seventh Circuit Court of Appeals concluded that the prosecutor's reliance on these responses in challenging the juror satisfied "*Batson*'s requirement that such explanations be clear and reasonably specific, contain legitimate reasons, and be related to the case." 803 F.2d at 330. Therefore, a prospective juror's record-supported hesitancy or equivocation about the ability to evaluate a particular type of evidence, such as testimony officially translated from a foreign language, is a neutral reason for challenging that juror.

The prosecutor's concern in this case that the two jurors in question might unduly influence the jury is very similar to the legitimate concern a party might have that doctors serving as jurors might unduly influence a jury making a complex medical determination; that psychiatrists or psychologists serving as jurors might unduly influence a jury determining an insanity defense; or that accountants serving as jurors might unduly influence a jury in a tax-evasion trial. The fear of undue or improper influence often prompts both defense attorneys and prosecutors to exercise peremptory challenges against jurors with special expertise regardless of whether it is clear which side stands to benefit from the juror's unique knowledge. *Batson* does not require a prosecutor to accept the risk of such influence merely because the challenged juror is of the defendant's racial or national origin group. *See United States v. Rodrequez*, 859 F.2d 1321 (8th Cir. 1988), *cert. denied*, 489 U.S. 1058 (1989) (possibility that juror who was a pharmacist might form an independent opinion on narcotics charges held a legitimate, nonracial reason to exercise a peremptory challenge under *Batson*).

Contrary to defendant's suggestion (Brief for Petitioner at 25), even jurisdictions which require the prosecutor to show the juror's "specific bias" in order to rebut a *prima facie* showing of discrimination do not require the prosecutor to establish that the challenged juror will be biased for or against one party. *See Slappy v. State*, 503 So.2d 350 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986); *Soares*, 377 Mass. at 461, 387 N.E.2d at 499; *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978). It is sufficient to show that the juror's expertise or personal feelings might affect his or her ability to deliberate fairly on a particular set of facts. *See, e.g., State v. Pemberthy*, 224 N.J. Super. 280, 540 A.2d 227, *cert. denied*, 111 N.J. 633, 546 A.2d 547 (1988) (peremptory challenge of all jurors who spoke Spanish, in a case involving the interpretation of audio-taped conversations in Spanish, found to be proper and race-neutral, particularly where one of the challenged jurors was a Caucasian who taught Spanish as a career). Thus, peremptory challenges are race-neutral and should be permitted when the *voir dire* supports a reasonable conclusion that the juror's individual characteristics might affect the juror's judgment of the case or unfairly influence the rest of the jury.

The racial neutrality of the prosecutor's reason for challenging the Spanish-speaking jurors is further demonstrated by its close relationship to a recognized cause challenge. Clearly, jurors can be removed for cause if they are unable to follow the instructions of the court defining the law and the evidence to be considered. Likewise, they can be removed on a peremptory challenge when their answers give legitimate reason to suspect their inability to follow such instructions. *See* Serr and Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 44-45 (1988) (discussing the

validity of peremptory challenges which are closely related to recognized cause challenges).

Indeed, peremptory challenges exist precisely to enable parties to challenge jurors who display verifiable signs of an inability to consider properly a particular type of evidence, but whose responses during *voir dire* do not provide sufficient basis to warrant a challenge for cause. *See Batson*, 476 U.S. at 97; *United States v. Vacarro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987); *McCray*, 750 F.2d at 1132; *Wheeler*, 22 Cal.3d at 274-75, 148 Cal. Rptr. at 901-02, 583 P.2d at 760-61. The challenges at issue here were based on a reasonable fear of the jurors' inability to judge the evidence in this case and were, therefore, entirely proper.[9]

In fact, defendant conceded in his brief to the New York Court of Appeals that a proper, race-neutral cause challenge would lie if a juror stated that he or she could not abide by the official translation. Brief for Appellant at 26 n.11, *Hernandez*, 75 N.Y.2d at 350, 552 N.E.2d at 621, 553 N.Y.S.2d at 85. The two jurors' ultimate assurances in this case that they could follow the court's instructions and accept the same evidence as the other jurors does not make the prosecution's reliance on their earlier equivocation any less race-neutral on its face. *See, e.g., Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792, 796 n.2 (1987); *see also* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Verdicts*, 56 U. Chi. L. Rev. 153, 207 (1989). Any contrary interpretation necessarily converts the *Batson* requirement of racial neutrality into a rule pre-

9 Defendant's repeated citation to *Bruton v. United States*, 391 U.S. 123 (1968), in this context is curious. The Court's concern about the ability of jurors to follow legal instructions to consider only the appropriate evidence furnishes no support for a rule requiring the acceptance of jurors who will find it difficult to do just that. *See Cruz v. New York*, 481 U.S. 186, 194 (1987).

cluding prosecutors from challenging jurors unless they can establish a basis to support a challenge for cause.[10]

Defendants often challenge jurors who express similar hesitancy about their ability or willingness to follow the court's instructions on such matters as the presumption of innocence, the burden of proof, or the constitutional right not to testify, even when those jurors ultimately swear that they can be fair. Defense attorneys and prosecutors are entitled to prefer jurors who express no such equivocation, and *Batson* does not prohibit such a preference.[11]

10 The New York Court of Appeals properly recognized that *Batson* specifically rejected such an approach:

> That burden, moreover, does not require the prosecution . . . to come forward with reasons rising, in effect and function, to a sustainable challenge for cause, for that would extend *Batson* . . . and not apply [it]. Justice Powell's opinion for the Supreme Court in *Batson* is the primary source of guidance and development, and it is carefully modulated to require that the prosecution must show only a neutral record-based belief for exercising a now properly circumscribed right of peremptory excusal of jurors. To bear a proper and balanced burden of coming forward with a neutral explanation of a peremptory excusal of a juror is one thing; to create a new, higher burden of disproving, under "enhanced scrutiny" and the "inherently suspect" classification, a subjective, even "unconscious," state of mind is quite something else. This would be practically and legally speaking an impossible and ultimate burden of proof, not the lesser burden of coming forward with a justifiable explanation. Indeed, this rule would not just circumscribe the exercise of a peremptory challenge by the People; it would change its very nature because the People would have to prove cause for removal as to the juror and absolute purity as to themselves.

Hernandez, 75 N.Y.2d at 357, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

11 As defense counsel said in asking the court to grant a cause challenge notwithstanding such assurances, "I tried a lot of cases and I can't remember one case where any juror ever said he could not be fair and impartial." It has been held in New York to be a denial of a defendant's right to an impartial jury for the court to rely solely on a juror's assurances in denying a cause challenge:

(*Footnote continued*)

B. The Prosecutor Did Not Rely on Racial Assumptions or Stereotypes, but Based His Challenges on the Jurors' Answers and Demeanor. Therefore, His Challenges of Two Individual Prospective Jurors Were Legitimate and Nondiscriminatory.

Because "[j]ury competence is an individual rather than a group or class matter," *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946), *Batson* requires that in response to a *prima facie* case of discrimination, the prosecutor give reasons which are clearly and specifically asserted, supported by the information obtained from *voir dire*, and related to the case on trial. "If the juror is excluded because of a trait other than race, the trait must apply to the juror specifically and to the facts of the particular case." *State v. Butler*, 731 S.W.2d 265, 269 (Mo. Ct. App. 1987) (citing *Slappy*, 503 So.2d 350). These requirements were met in this case. The record demonstrates that the two Spanish-speaking jurors were not challenged because of any assumption or speculation by the prosecutor. The prosecutor's concern about these jurors' abilities to follow the court's instructions instead sprang directly from the answers they provided during *voir dire*.

The jurors were questioned about their ability to accept the translation because of the prosecutor's case-related concern. Among the witnesses he planned to call to testify at the trial was Ada Saline, an eyewitness to the entire crime and one of the victims. Mrs. Saline was to be the chief prosecution witness and was expected to testify in Spanish, with the assistance of an official court interpreter. While she ultimately did not testify, the record establishes that at the time of jury selection she was expected to do so, having cooperated with the prosecution until after jury selection was completed,

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> The mere words, themselves, however, have no talismanic power to convert a biased juror into an impartial one. . . . They must be taken in context.

People v. Blyden, 55 N.Y.2d 73, 78, 432 N.E.2d 758, 760, 447 N.Y.S.2d 866, 888 (1982).

when she fled to Puerto Rico with defendant's wife (transcript of November 3 to 7, 1986 at 40-42, 67; transcript of November 10 to 17, 1986 at 353-56). Moreover, Mrs. Saline's testimony was expected to be significant, in that she was the only available witness to the incident who could support either the officers' or the defendant's version of the shooting.

Thus, the prosecutor was legitimately concerned about the ability of each member of the jury to defer to the official court interpreter's rendition of the testimony, because it was possible that a juror with a personal and unverifiable interpretation of that testimony might have an undue influence in the jury room. The prosecutor addressed this concern by questioning (and asking the court to question) the Spanish-speaking prospective jurors to determine their willingness and ability to put aside any special language expertise and to decide this case on the evidence before the rest of the jury.

In response to these questions, the two jurors offered "a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses" (Joint App. at 3). Although defendant now seeks to discredit the prosecutor's reliance on the jurors' equivocation and demeanor, he did not challenge the factual basis for that reliance before the trial court, which had the benefit of hearing the actual questions and answers and observing the demeanor of the jurors. Moreover, in his brief to this Court, defendant repeatedly concedes the existence of the jurors' equivocation (*see* Brief for Petitioner at 12-13, 15-16, 18, 25).[12] The record establishes both that the jurors' responses were significantly hesitant and equivocal, and that

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12 Defendant also argues without support that the prosecutor may have treated other prospective jurors with similar problems differently. In fact, the only indications in the record are to the contrary. First, the prosecutor expressed the belief that not all of the jurors in question were Latino. Second, one of the reasons offered by the prosecutor for not challenging these jurors for cause was because they had ultimately stated that they could be fair and impartial—the same reason he had refused to consent to cause challenges to jurors whom defendant had claimed might be biased in favor of police testimony.

their demeanor left a substantial question about their ability to comply with the requirement that they accept as authoritative the English translation of the testimony.[13] Indeed, the trial court found that the prosecutor had "grave doubts" about the jurors' ability, based on their responses in *voir dire* (Joint App. at 10).

There is a difference between *assuming* that all persons who speak Spanish will be unable to abide by the court's instructions to accept as final the English translation of testimony given in Spanish, and *establishing* a basis in the record to suggest that individual Spanish-speakers might be unable to do so. The first may violate equal protection; the second, although it might have a disparate impact on Latinos, certainly does not. *See Slappy*, 503 So.2d at 355-56. *Batson* forbids only intentional discrimination, whether explicit or otherwise, based on impermissible bias, assumption or stereotype. *Batson* does not forbid the exclusion of jurors who have demonstrated through their answers and demeanor during *voir dire* that they might be unable to judge the case solely upon the admissible evidence.

The opinion of the Tenth Circuit Court of Appeals in *United States v. Brown*, 817 F.2d 674 (10th Cir. 1987), demonstrates the difference between improper assumptions and proper reliance on the facts revealed in *voir dire*. There, the prosecutor challenged African-American jurors on the

13 Contrary to defendant's claim (Brief for Petitioner at 14 n.9), the prosecutor properly relied on the jurors' demeanor during questioning in making his evaluation of their individual degree of uneasiness about their ability to perform the mental task required in this case. *See Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984) ("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible."). Moreover, defendant never argued to the trial court that the prosecutor's understanding of the demeanor displayed by Latinos was mistaken. Therefore, he cannot now rely on this argument to undercut the trial court's decision.

assumption that they would be unduly influenced by the defendant's attorney, a prominent African-American attorney who, in the prosecutor's experience, had "a very special appeal" to African-Americans in the community. The Tenth Circuit ruled that the challenges exercised by the prosecutor were not race-neutral because they were based on "surmise" rather than fact. The court made clear, however, that had the *voir dire* disclosed "an affinity between a prospective juror and the defense counsel," it would have permitted the challenge. *Brown*, 817 F.2d at 676. Here, in significant contrast to the facts in *Brown*, the *voir dire* did substantiate the prosecutor's belief that the individual Spanish-speaking jurors he challenged might be unable to decide the case on the evidence heard by the remainder of the jury. Because the challenges in this case were based on evidence developed in *voir dire* and not on an assumption or racial stereotype, the challenges were race-neutral. *Cf. United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989); *Slappy*, 503 So.2d at 355.

C. Defendant's Impact-Based Definition of Racial Neutrality Unjustifiably Distorts the Intent of the Equal Protection Clause.

Defendant nonetheless argues that the prosecutor's reason was not race-neutral (or, in defendant's words, was "a *per se* violation of *Batson*" [Brief for Petitioner at 12]), *even if supported by the record*. None of the arguments defendant offers in support of this contention has any foundation in the evidence or in this Court's equal protection analysis.

Defendant first claims that the prosecutor's reason, if held to be valid, will inevitably result in the exclusion of all Spanish-speaking (and thus, all Latino) jurors from cases involving testimony in Spanish because "any honest bilingual juror" would demonstrate the same hesitancy (Brief for Petitioner at 14-17). This argument, which was never made to the trial court, is based on the type of group assumption that *Batson* was intended to preclude. Just as a racial assumption cannot support the peremptory challenge of a juror, so, too, a racial assumption—e.g., that all Latinos will be equally

hesitant—should not invalidate a peremptory challenge that is otherwise genuine and neutral. Jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race. . . . An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950). Moreover, defendant has not demonstrated, and we do not believe, that such a result will occur.

Defendant has not provided persuasive support for his theory that the impact on Latinos of permitting legitimate challenges tangentially related to language fluency will so devastate the right of Latinos to sit as jurors that this Court should carve out an exception to its case law requiring proof of discriminatory intent in equal protection cases. It must be emphasized that the issue is not whether most Latinos are bilingual but whether qualified Latino potential jurors will all express the same equivocation as did the jurors in this case. While the statistics cited by defendant and the Mexican American Legal Defense and Educational Fund, *et al.* (hereinafter *amici*) show that the majority of Latino prospective jurors speak some Spanish, *see* Brief for Petitioner at 3 & n.3; Brief for *Amici*, Appendices, these statistics do not take into account the fact that no citizen is qualified to serve on a jury without sufficient English proficiency to understand the proceedings. As a result, those jurors who may have the greatest difficulty putting aside their Spanish language ability are the most likely to be excused for reasons unrelated to the prosecution's exercise of peremptory challenges. *See People v. Guzman*, 60 N.Y.2d 403, 411, 457 N.E.2d 1143, 1147, 469 N.Y.S.2d 916, 920 (1983), *cert. denied*, 466 U.S. 951 (1984) (finding that the under-representation of Latinos on grand jury panels in Brooklyn is due to nondiscriminatory reasons); *see also United States v. Wesevich*, 666 F.2d 984, 991 (5th Cir. 1982); *United States v. Yonkers Contracting Co.*, 682 F. Supp. 757, 762, 764-65 (S.D.N.Y. 1988).[14]

14 Like most states and the federal government, New York requires that all of its potential jurors be, *inter alia*, citizens of the United States who are able to read and write English well enough to fill out the juror qualification questionnaire and who can "speak the English language in an understandable manner." N.Y. Judiciary Law § 510; *see also* 28 U.S.C. § 1865.

In addition, the statistics cannot be broken down to eliminate from the bilingual category those jurors whose understanding of Spanish is either limited to the written word or so minimal that they will be unable to understand testimony given in Spanish without the assistance of an interpreter. There is no reason to believe that those jurors, at least, will equivocate about accepting that interpretation. Defendant's analysis, therefore, offers no support for the proposition, with which we vehemently disagree, that an affirmance in this case means that "*Batson* will essentially not apply to Latinos" (Brief for Petitioner at 8).[15]

Indeed, the statistics cited by defendant and *amici* (Brief for Petitioner at 10 & n.3; Brief for *Amici* at 8-11, Appendices) provide some support for the contrary view. According to those statistics, approximately one-fourth to one-third of the "Spanish-Origin population" who reside in the United States speak little or no Spanish.[16] Certainly, that large portion of the Latino population will have no difficulty in accepting testimony translated from Spanish. It is likely that different individuals will have more or less difficulty in accepting the official interpretation of the testimony depend-

15 *See City of Richmond, Va. v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989) ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977); *see also Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

16 The term "bilingual" refers to anyone "who can function to some degree in more than one language." It can mean, for example, an individual "who is a native speaker of English and who can read French, but does not speak or understand the spoken French language." (Brief for *Amici*, Appendix F). That bilingual juror is unlikely to hesitate to accept the official translation of spoken words he or she cannot understand.

ing, for example, upon their relative degrees of fluency in English and Spanish.

Nor is there a basis to assume that all Spanish-speakers, even those who are the most fluent, will automatically be hesitant to assure the court that they will not listen to or consider information that the court has instructed them to overlook. Individual jurors will undoubtedly have individual responses to this inquiry. Jurors may have different views about the extent to which they will have a problem and the extent to which they can overcome it. The whole thrust of equal protection is to ensure that people are treated as individuals and are not discriminated against on the basis of group identity. Therefore, it is improper either to exercise *or* to disallow peremptory challenges based upon the assumption that all jurors who speak Spanish will both have and express the identical difficulty in accepting the official translation.

Furthermore, defendant would dramatically alter the *Batson* principles of neutrality in order to prevent whatever disparate impact might occur. "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *City of Richmond, Va. v. J.A. Croson Co.*, 488 U.S. 464, 578 (1989) (Kennedy, J., concurring). Yet, in defendant's view, apparently, an otherwise neutral reason for the exercise of a peremptory challenge, such as the juror's expression of difficulty in following the court's instructions, would lose its neutrality if the reason for the juror's expression of concern was related to Spanish language proficiency.[17]

17 Defendant asserts that "[t]he same type of 'hesitancy,' exhibited by these two jurors or other bilingual Latinos would exist if jurors generally were each questioned about their willingness and ability to follow other court instructions to disregard statements made in court. . . . Of course, jurors are not asked and it is assumed that they actually follow the court's instructions" (Brief for Petitioner at 16-17). In fact, inquiry from the parties and the court about prospective jurors' ability to decide the case based on the law and the facts takes place in criminal trials all the time. Presumably defendant would agree that equivocation in accepting the presumption of innocence would be a race-neutral reason for challenging a juror, and it is unlikely that he would support a rule requiring acceptance of that juror when the equivocation is somehow related to race or ethnicity.

Contrary to defendant's claim, "[w]hile [the *Batson*] rule interdicts the exercise of peremptory challenges for purely racial reasons, it does not forbid challenges of minority jurors for legitimate reasons tangentially connected with their race," *Brown*, 817 F.2d at 676, so long as the prosector "brings out facts during *voir dire*" which support those reasons. Serr and Maney, *supra*, at 51.

In *Gilmore*, 103 N.J. at 531, 511 A.2d at 1161-62, the New Jersey Supreme Court rejected an argument similar to defendant's as contrary to the principles of equal protection. The court distinguished "impermissible perceived group bias . . . from a prosecutor's exclusion of members of a cognizable group for valid, articulated, trial-related reasons," even if those reasons are related to race. In *St. Lawrence v. Scully*, 523 F. Supp. 1290, 1298 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982), Judge Weinfeld rejected on *habeas corpus* review a state prisoner's challenge to a conviction in an interracial rape case that followed a trial at which the prosecutor challenged for cause an African-American juror who said that race "would have to be" a part of his consideration of the case, given "the history of events, based on the past." The juror's statement to the defense attorney that he could decide the case based on the evidence was insufficient to disallow the cause challenge. *Cf. Lynn v. Alabama*, 110 S. Ct. 351 (1989) (Marshall, J., dissenting from denial of *certiorari*) (reliance on a factor closely related to race should not be considered a legitimate basis for exercising a peremptory challenge unless there is some corroboration in *voir dire* that the challenged juror actually entertains the bias supposedly linked to that factor). These cases recognize the principle that a challenge does not lose its racial neutrality under *Batson* merely because something that the juror has articulated, leading to the challenge, is related to race; the issue, as it is in all

equal protection cases, is whether the prosecutor has acted on the basis of race.[18]

Examples suggested by defendant illustrate the fundamental flaws in his argument. In one example, (Brief for Petitioner at 21 n.17), based on a case involving identification of an African-American defendant by a white witness, defendant concludes that it would be improper to strike all African-American jurors on the assumption that they would doubt a white person's ability to identify accurately an African-American. We agree. However, if a juror's answers and demeanor during *voir dire* provided a basis for a party to believe that the juror might in fact be unable to judge fairly the identification testimony in the particular case to be tried, the challenge of that juror would not be prohibited by the Equal Protection Clause, irrespective of whether the juror's answers were related to race. Thus, it would not be impermissible to challenge an African-American who stated the belief that whites cannot make reliable cross-racial identifications. All that *Batson* prohibits is the assumption that members of a particular race would have such a belief and the striking of jurors on that assumption.

Similarly, in *Minniefield v. State*, 539 N.E.2d 464 (Ind. 1989) and *People v. Johnson*, 22 Cal.3d 296, 148 Cal. Rptr. 915, 583 P.2d 774 (1978), which provide the basis for defendant's other example (Brief for Petitioner at 20 n.16), the prosecutors' concern that African-American jurors might react negatively to prosecution witnesses who used racial epithets was rejected, not because it was a *per se* violation of *Batson* (or, in *Johnson*, of the California State Constitution), but because the prosecutors assumed without inquiry that by virtue of racial identity, all African-Americans would react the same way.

18 In his dissent in *Witherspoon v. Illinois*, 391 U.S. 510, 539-40 (1968), Justice Black cited the following quotation from Justice Story:

> To insist on a juror's sitting in a case when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice [which is required]. *United States v. Cornell*, 25 Fed. Cas. 650, 655-656, No. 14,868 (1820).

By focusing solely on the perceived impact of the prosecutor's challenges in this case, rather than the prosecutor's intent, defendant seeks to turn *Batson* from the intent-driven inquiry mandated by the Equal Protection Clause into a result-driven inquiry barring peremptory challenges for reasons having a disparate impact on particular racial or national origin groups.

This Court has repeatedly affirmed, in many contexts, that proof of a disparate impact alone is not sufficient to establish a violation of the Equal Protection Clause. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (imposition of the death penalty); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (zoning); *Washington v. Davis*, 426 U.S. at 239-40 (employment discrimination); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 298 (1973) (schools); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (election districting); *Whitus v. Georgia*, 385 U.S. 545, 550 (1967) (jury selection). This Court "ha[s] not embraced the proposition that a law or other official act, without regard to whether it reflected a racially discriminatory purpose, is unconstitutional *solely* because it has a disproportionate impact." *Davis*, 426 U.S. at 239 (emphasis in original); *see also Hunter v. Underwood*, 471 U.S. 222 (1985). In *Batson* itself, this Court stressed that the Equal Protection Clause prohibits those "[s]election procedures that purposefully exclude black persons from juries." 476 U.S. at 87. Therefore, to prevail on a *Batson* claim, as with any other claim founded on the Equal Protection Clause, the defendant must prove that the prosecutor used peremptory challenges with an intent to discriminate on the basis of race or other impermissible criteria. *Batson*, 476 U.S. at 93.

The fact that a challenged action has a disparate impact on members of the defendant's racial or national origin group may be used, as it was by the New York appellate courts in this case, to establish a *prima facie* case of discrimination in any equal protection context, requiring the state or the employer to set forth the neutral criteria which produced the unintended result. *Batson*, 476 U.S. at 93; *Davis*, 426 U.S. at 242. If such an explanation is not given, *see, e.g., Alexander v. Louisiana*, 405 U.S. 625, 632 (1972), the *prima facie* case remains unrebutted and the defendant has proven intentional discrimination. *Batson*, 476 U.S. at 100; *cf. Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). But disparate impact, standing alone, is insufficient to prove a violation of the Equal Protection Clause. In this case, the prosecutor met his burden of setting forth his legitimate, record-supported, neutral reason for challenging each of the prospective jurors. Therefore, the presumption of discrimination was rebutted.

The final flaw in defendant's argument is its implicit assumption that criminal defendants have a constitutional right to be tried by a jury which includes members of their own racial or national origin group, rather than by a jury selected through nondiscriminatory practices. The Equal Protection Clause "guarantees equal laws, not equal results." *Personnel Admin'r v. Feeney*, 442 U.S. 256, 273 (1979). In *Batson*, this Court once again stressed that defendants are not entitled under the Equal Protection Clause to any particular representation on the jury:

> In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' *Id.*, at 305.

Batsbn, 476 U.S. at 85.

Moreover, in refusing to import the Sixth Amendment's fair cross-section requirement from the jury venire to the petit jury itself, this Court has recognized that the State may

have legitimate interests in permitting challenges that disrupt the original racial balance of the venire. For example, in *Lockhart*, 476 U.S. at 175-76, this Court held that because the state has a "legitimate interest in obtaining a single jury which can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial," the fair cross-section requirement is not violated when a group of prospective jurors is disqualified for a reason related to "the ability of members of the group to serve as jurors in a particular case." *See also Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (ruling that the Sixth Amendment does not require "that petit juries actually chosen must mirror the community and reflect the various distinct groups in the population."). Likewise, peremptory challenges based on reasons similar to those that support challenges for cause may, in a particular case, exclude members of the defendant's racial or national origin group, but that result also would not require or permit a court to disallow proper peremptory challenges. *See Alexander*, 405 U.S. at 631-32 (the State can rebut the inference of racial discrimination in selection of the venire by "showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.").

Contrary to defendant's claim (Brief for Petitioner at 26-27), the Equal Protection Clause does not require the state to consider alternatives to neutral practices which have a disparate impact on a racial or national origin group. Only after a finding of intentional discrimination—a finding which has not been made in this case—does the Equal Protection Clause require the state to establish that the challenged action serves a compelling state interest. *See J.A. Croson Co.*, 488 U.S. at 469. Furthermore, the alternative remedy suggested by defendant, that a juror notify the court whenever the juror disagrees with the official interpretation (Brief for Petitioner at 26), is inadequate; it does nothing to prevent the juror from relying on or offering to his or her fellow jurors a different version of the evidence during deliberations.

Although assuring the accuracy of the official translation of testimony is absolutely essential to a fair judicial system, the facts of *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981), compellingly demonstrate that the best way to address the problem is for courts to train and officially oversee the official interpreters, rather than to permit every juror to become an *ad hoc* interpreter with the duty to critique the translation in a particular case. And, contrary to the reasoning of the dissent below, it is not logical to assume that if the official interpreters are accurate, jurors will have no disagreements with their interpretation. *Hernandez*, 75 N.Y.2d at 364, 552 N.E.2d at 628, 553 N.Y.S.2d at 92. This assumption disregards the fact that not every Spanish-speaker can understand every other Spanish-speaker. Like English, French, or any other language spoken by large and geographically disparate groups, there are many regional dialects of Spanish. Also, as *amici* point out, different jurors are likely to have different levels of proficiency and comprehension. Given the grave consequences of mistaken interpretation, the responsibility for ensuring accurate interpretation should be left to the official court interpreters who, unlike jurors, are certified by the court in New York State, are required to take a constitutional oath of office, N.Y. Judiciary Law § 386, and are under a legal duty to translate the testimony accurately and to inform the court if they cannot understand the witness.

The New York courts properly applied *Batson* to the prosecutor's peremptory challenges in this case. The fact that the prosecutor's challenges resulted in the exclusion of Latinos from the jury led the trial court to examine the prosecutor's reasons; it did not require the court to reject those reasons as a matter of fact or as a matter of law. The New York appellate courts critically examined the *voir dire* record and concluded that the prosecutor's reasons were neither based on racial assumptions nor pretextual, but were instead clearly articulated, based on the responses of the jurors developed during *voir dire*, and related to the case on trial. These rulings should be affirmed.

POINT II

THE FACTUAL FINDINGS UNDERLYING A TRIAL COURT'S DETERMINATION THAT THE PROSECUTION HAS PROFFERED LEGITIMATE, NEUTRAL REASONS FOR ITS PEREMPTORY CHALLENGES ARE ENTITLED TO GREAT DEFERENCE ON APPEAL AND SHOULD NOT BE OVERTURNED UNLESS CLEARLY ERRONEOUS.

Appellate courts evaluating *Batson* claims are guided by the principles which this Court has consistently applied to other equal protection cases, especially those involving the selection of juries. "The basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.' " *Batson*, 476 U.S. at 84 n.3 (citing *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 [1972]). The *Batson* Court expressly incorporated into its procedures for reviewing peremptory challenges the "standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause," 476 U.S. at 93, as well as traditional equal protection analysis regarding the burden of proof and the standard of review. 476 U.S. at 93-94, 94 n.18, 98 n.21. That is, the appellate court must first determine whether the prosecutor's explanation for each peremptory challenge at issue is, as a matter of law, neutral on its face. If so, the court must then review the record to determine whether the explanation meets all of the other *Batson* criteria, but must give deference to the trial court's factual findings and can reverse them only if clearly erroneous. The New York Court of Appeals conscientiously followed this framework in analyzing defendant's claim of discrimination in the selection of the jury in this case. *Hernandez*, 75 N.Y.2d at 355-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88.

Nonetheless, defendant urges that his case must now be given "independent plenary review" (Brief for Petitioner at 28). Defendant is neither clear nor consistent about what he considers "plenary review" to entail. If it requires an appel-

late court to carefully review the entire record to determine whether the trial court's factual findings are supported by the evidence and based on an application of the correct legal principles, then defendant received "plenary review" of his claims by the New York Court of Appeals. If, instead, plenary review requires appellate courts to review *Batson* claims *de novo*, giving no deference to the trial court's factual findings, then defendant has proposed a new standard of review which differs from the standard of appellate review set out in *Batson* and in other equal protection contexts, as well. There is no support in law or policy for applying a special standard of review in peremptory challenge cases. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren*, 429 U.S. 190, 211-212 (1976) (Stevens, J., concurring).

In setting out the principles of law to be applied to a claim of discrimination in the selection of the petit jury, this Court in *Batson* expressly incorporated the standard of appellate review traditionally applied in equal protection cases.

This Court stressed that "[a]s in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection . . . to prove the existence of purposeful discrimination.' " *Batson* 476 U.S. at 93 (citing *Whitus v. Georgia*, 385 U.S. 545, 550 [1967]). Furthermore, in embracing the rules established for disparate treatment claims under Title VII for the allocation of the intermediate burdens of proof and production, the Court reiterated that the "party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion." *Batson*, 476 U.S. at 94 n.18. And finally, the Court made clear that the trial court's findings of fact, including its finding on the issue of the prosecutor's intent, would be entitled to great deference on appeal:

> '[A] finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575-76.

Batson, 476 U.S. at 98 n.21.

This Court's admonition to appellate courts to give great deference to the trial court's factual findings and its citation to *Anderson* represent an adoption of the clear error standard which is traditionally applied to appellate review of determinations regarding intentional discrimination in other contexts. In *Anderson*, 470 U.S. at 573, a disparate treatment, gender-discrimination case brought under Title VII, this Court discussed the scope of the deference to be given findings on the issue of intentional discrimination in the federal courts, as set forth in Federal Rule of Civil Procedure 52(a). A "finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Under this standard, the reviewing court is not permitted to decide the factual issues *de novo* and to reverse the factual findings of the lower court simply because it would have decided the case differently. *Anderson*, 470 U.S. at 573. The appellate court must respect the trial court's superior ability to judge credibility, stemming from the trial court's unique opportunity to see and hear the witnesses. Therefore,

> [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Anderson, 470 U.S. at 573-74 (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 [1949]); *see* also *Clemons v. Mississippi*, 110 S. Ct. 1441, 1457-58 (1990) (Blackmun, J., concurring in part and dissenting in part).[19]

The question of intentional discrimination has long been treated as a factual determination for the trial court, to be given deference on appeal. In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court ruled that a finding on whether a company's seniority system reflected an intent to discriminate on the basis of race

> is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent. Discriminatory intent here means actual motive; it is not a legal

19 This standard of review has been adopted by every federal Circuit Court of Appeals which has reached the issue of the standard of review to be applied to *Batson* determinations. *See United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2178 (1990); *United States v. Angiulo*, 847 F.2d 956, 985 (1st Cir.), *cert. denied*, 488 U.S. 852 (1988); *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Clemons*, 843 F.2d 741, 744 (3rd Cir.), *cert. denied*, 488 U.S. 835 (1988); *United States v. David*, 844 F.2d 767, 769 (11th Cir. 1988); *United States v. Lewis*, 837 F.2d 415, 417 (9th Cir.), *cert. denied*, 488 U.S. 923 (1988); *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *United States v. Love*, 815 F.2d 53, 54-55 (8th Cir.), *cert. denied*, 484 U.S. 861 (1987); *Mathews*, 803 F.2d at 325. Similar deference is accorded to the trial court's factual findings of *Batson* claims by most state appellate courts. *See, e.g., Ex Parte Branch*, 526 So.2d 609, 625 (Ala. 1987); *People v. Johnson*, 47 Cal.3d 1194, 1221, 255 Cal. Rptr. 569, 579-80, 767 P.2d 1047, 1059 (1989); *Gamble*, 257 Ga. 325, 357 S.E.2d at 794; *Butler*, 731 S.W.2d at 271 (all applying great deference/clear error standard); *People v. McDonald*, 125 Ill.2d 182, 125 Ill. Dec. 781, 530 N.E.2d 1351, 1358 (1988) (against the manifest weight of the evidence); *Stamps v. State*, 515 N.E.2d 507, 510 (Ind. 1987) (manifest abuse of discretion); *Keeton v. State*, 749 S.W.2d 861, 870 (Tex. Crim. App. 1988) (viewing evidence "in the light most favorable to the [trial] court," is the decision supported by the record).

> presumption to be drawn from a factual showing of anything less than actual motive.

at 289-90; *see also White v. Register*, 412 U.S. 755 (1973) (great deference accorded findings of intentional racial discrimination in vote dilution cases). In short, review of factual findings under the clear error standard is "the rule not the exception." *Anderson*, 470 U.S. at 575.

Clear error is also the appropriate standard for reviewing all of the subsidiary factual issues which lead to the trial court's ultimate determination regarding intentional discrimination in a *Batson* case. As codified in Rule 52(a), the clear error standard "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287; *cf. Miller v. Fenton*, 474 U.S. 104, 117 (1985) (review of subsidiary factual questions in determining the voluntariness of a confession is to be given deference on *habeas corpus* review, even though voluntariness is a mixed question of law and fact).

Moreover, although Rule 52(a) does not apply to review of state cases, "it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984). This Court should apply the same standard of review to state and federal determinations of *Batson* claims. Furthermore, this Court should not impose on state appellate courts a more stringent standard of review than the federal appellate courts apply to claims of intentional discrimination.

Contrary to defendant's argument that a different standard is required, this Court has found the clear error standard to be well suited to appellate review of issues similar to the one

here. In considering the related issue of a juror's bias or unfitness to serve, this Court explained:

> [T]he determination is essentially one of credibility and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal to 'special deference.'

Patton, 467 U.S. at 1038 (citation omitted). "The question of a juror's bias or prejudice is totally factual in nature." *Peters v. Kiff*, 407 U.S. 493, 511 (1972) (Burger, C.J., dissenting). Trial judges at *voir dire*, like jurors at trial, "must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. . . . In neither instance can an appellate court easily second-guess the conclusion of the decision-maker who heard and observed the witnesses." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *see also Wainwright v. Witt*, 469 U.S. at 429.

Credibility and demeanor are no less at issue in peremptory challenge cases. The Second Circuit has explicitly rejected defendant's suggestion (Brief for Petitioner at 45) that it is an appellate court's task in a peremptory challenge case to "decide which side is more likely correct." *United States v. Ruiz*, 894 F.2d 501, 506 (2d Cir. 1990). Instead, the trial court's "findings as to the motivations of the prosecution in exercising its peremptory challenges must be upheld unless they are clearly erroneous . . . and its assessment of the credibility of the witnesses who appear before it are entitled to considerable deference." *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

The New York Court of Appeals in this case scrupulously honored its obligation under *Batson*. The court rejected defendant's claim, first articulated before that court, that the prosecutor's explanation was invalid *per se* because of its disparate effect on Latinos, and ruled that:

> [I]t cannot be, as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic factor alone determines this case. Rather, the prosecutor's belief was that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court. That is a legitimate neutral ground for exercising a peremptory challenge, and it was for the trial court to determine if the prosecutor's explanation was pretextual or real and justified by the answers and conduct of the two jurors during voir dire.

75 N.Y.2d at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87. The Court of Appeals then reviewed the entire record and found sufficient support for the lower courts' factual findings that the jurors had displayed the hesitancy upon which the prosecutor had based his challenges; that the prosecutor's reason was genuine, case-related and not pretextual; and that defendant had failed to meet his burden of proving purposeful discrimination in this case. While the Court of Appeals properly gave deference to the factual findings of the lower courts, the court made it clear that it would not accept as sufficient "less verifiable manifestations of juror's attitudes." 75 N.Y.2d at 358, 552 N.E.2d at 624, 553 N.Y.S.2d at 88. The court properly affirmed the conclusion that a violation of the Equal Protection Clause had not occurred in this case.[20]

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20 The New York Court of Appeals has jurisdiction only over questions of law in most criminal cases; it can review facts only in death penalty cases. N.Y. Const. art. VI, § 3; N.Y. Crim. Proc. Law §§ 450.70, 450.80, 470.30, 470.35. By contrast, the Appellate Division has unusually broad factual review powers in criminal cases and is expressly permitted to engage in *de novo* factual review. N.Y. Crim. Proc. Law § 470.15. Under this jurisdictional scheme, the Court of Appeals cannot reverse any factual finding made by a criminal trial court and affirmed by an Appellate Division unless that factual finding is unsupported by the evidence as a matter of law. *People v. Leonti*, 18 N.Y.2d 384, 390, 222 N.E.2d 591, 594, 275 N.Y.S.2d 825, 850 (1966), *cert. denied*, 389 U.S. 1007 (1967). Thus, the Court of Appeals could not conduct the *de novo* factual review defendant asks this Court to adopt.

Defendant fails to justify the application of a different standard to jury selection cases. First, he mistakenly asserts that this Court employed a contrary standard of review in its decisions prior to 1977. Although there is some language in the cases upon which defendant relies suggesting that the determination was to be made *de novo*,[21] most of the cases articulate a review standard more similar to the clear error standard applied today than to the plenary review standard defendant urges this Court to adopt. *See Avery v. Georgia*, 345 U.S. 559, 561 (1953); *Cassell v. Texas*, 339 U.S. 282, 283 (1950); *Fay v. New York*, 332 U.S. 261, 270 (1947); *Smith v. Texas*, 311 U.S. 128, 130 (1940); and *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935). Indeed, in another case decided during this period, *Akins v. Texas*, 325 U.S. 398 (1945), the Court expressly applied a clear error standard of review. The *Akins* Court affirmed the factual findings of the trial court, ruling that the trial court's determination regarding the competing inferences in the testimony and its ultimate finding that there had been no intentional discrimination were not unreasonable in light of the record as a whole.

More importantly, regardless of the language used to articulate the review standard in these cases, the Court examined the record in a manner entirely consistent with the clear error standard of review which it now applies to such cases. Thus, in *Castenada v. Partida*, 430 U.S. 482 (1977), *Whitus v. Georgia*, 385 U.S. 545 (1967), *Avery*, *Cassell*, *Smith*, *Pierre*, and *Norris*, this Court essentially ruled that the factual findings of the trial courts were clearly erroneous because the state in each case had failed to offer any explanation sufficient to rebut the *prima facie* case of discrimination: either the state offered no explanation at all or it had proffered an

21 *See Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) ("when a claim is properly asserted . . . that a citizen whose life is at stake has been denied the equal protection of his country's laws because of race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts").

explanation which amounted to no more than general protestations of good faith.[22]

There is no merit to defendant's other suggestion that "independent plenary review" is necessary because trial judges cannot meet their responsibilities under *Batson* (Brief for Petitioner at 39-41). This Court in *Batson* twice expressed "confidence that trial judges, experienced in supervising *voir dire*" will be able to identify purposeful discrimination in jury selection. 476 U.S. at 96, 99 n.22. In other contexts, the Court has "reiterate[d its] confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants." *Miller v. Fenton*, 474 U.S. at 117. "[C]ourts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Not only are trial courts required, in a variety of contexts, to identify "discriminatory conduct and pretextual explanations" *McCray*, 750 F.2d at 1132, but they are often called upon to judge the credibility of prosecutors in response to suppression motions, trial objections, allegations of prosecutorial misconduct and other issues implicating a defendant's constitutional rights. They are certainly no less able than appellate judges to decide the issues in a *Batson* case. *See People v. Johnson*, 47 Cal.3d at 1219 n.6, 255 Cal. Rptr. at 578 n.6, 767 P.2d at 1056 n.6 ("[T]rial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the

22 In *Cassell*, for example, the undisputed facts have "no other rational meaning than purposeful discrimination." 339 U.S. at 295-96 (Frankfurter, J., concurring); *see also Norris*, 294 U.S. at 593 ("We are of the opinion that the evidence required a different result from that reached in the State courts."); *Smith*, 311 U.S. at 131 ("From the record before us the conclusion is inescapable" that unlawful discrimination occurred.).

genuineness of reasons given for peremptory challenges."); *see also Soares*, 377 Mass. at 490, 387 N.E.2d at 517 ("Although decisions of this nature are always difficult, we are convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with attorneys on both sides, will address those questions with the requisite sensitivity."); *Gilmore*, 103 N.J. at 545, 511 A.2d at 1169.

Contrary to the opinion of the dissent below, *Hernandez*, 75 N.Y.2d at 360-61, 552 N.E.2d at 626-67, 553 N.Y.S.2d at 90-91, appellate courts are not left helpless by the application of the traditional equal protection standard of review to peremptory challenge cases. The deference to trial courts' factual findings inherent in the clear error standard certainly does not forbid a comprehensive and searching review of the factual record. *Bose Corp.*, 466 U.S. at 499-500. Application of this standard of appellate review to the factual findings inherent in *Batson* claims does not suggest that appellate courts should engage in anything less than a rigorous, careful, and complete review of the record to determine whether the trial court's factual findings are supported by the *voir dire* questioning itself and all of the arguments made by each side. *See Patton*, 476 U.S. at 1031 n.7.

Indeed, the deferential review currently applied by federal and state appellate courts has not resulted in the wholesale adoption of trial courts' factual determinations in *Batson* cases. Rather, appellate courts are carefully examining the evidence available to them to determine whether the trial courts' conclusions are supported by the record. *See, e.g., United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989); *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Clemmons*, 892 F.2d 1153 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 1623 (1990); *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), *cert. denied*, 484 U.S 925 (1987).[23] A similar searching inquiry was undertaken

23 Even the most skeptical legal critics cite cases where trial and appellate courts are applying exacting review of *Batson* claims. *See, e.g.*, Note, *Rebutting the Inference of Puposeful Discrimination in Jury Selection under Batson v. Kentucky*, 57 UMKC L. Rev. 355, 366 n.110 (1989); Note, *Batson v. Kentucky: Two Years Later*, 24 Tulsa L.J. 63, 86-87 (1988); *Blume, Racial Discrimination in the State's Use of Peremptory Challenges: The Application of the United States Supreme Court's Decision in Batson v. Kentucky in South Carolina*, 40 S.C.L. Rev. 299, 331-33 (1989). Nor does the case law support the argument that because prosecutors no longer attempt to justify peremptory challenges by overtly racist reasoning, *Batson* has simply forced prosecutors to be more subtle in their racism. The cases clearly support the contrary inference: that the majority of prosecutors are honestly attempting to follow *Batson*.

in this case, within the boundaries permitted by the record defendant provided to support his claim.

Although defendant now seeks to have this case remanded to the trial court to make more explicit findings of fact than were originally made, he is not entitled to that relief. It is not the court's duty to ensure that an adequate record is made to permit appellate review of a defendant's claim. That duty is solely the responsibility of the defendant. *See People v. Olivo*, 52 N.Y.2d 309, 420 N.E.2d 40, 438 N.Y.S.2d 242 (1981); *People v. Yarborough*, 158 A.D.2d 811, 812, 551 N.Y.S.2d 397, 399 (3d Dep't), *leave denied*, 75 N.Y.2d 971, 555 N.E.2d 628, 556 N.Y.S.2d 256 (1990); N.Y. Crim. Proc. Law § 470.05(2). Here, the defendant neither requested that the *voir dire* be recorded in its entirety nor attempted to place his own characterizations of the challenged jurors' responses or demeanor on the record to support the arguments he now seeks to make on appeal. He did not claim that the prosecutor had questioned only Latinos about their language proficiency and its impact on their ability to decide fairly this case. He also did not claim that the prosecutor challenged only Latino prospective jurors who were unsure about their ability to decide the case solely upon the admissible evidence and the law. Thus, if the factual record in this case is not as complete as it might have been, any shortcoming is of the defendant's making. *See Wainwright v. Witt*, 469 U.S. at 437-38 (Stevens, J., concurring); Serr and Maney, *supra*, at 38. Defendant is certainly not entitled to a remand to the

trial court to permit him to flesh out the factual basis for arguments conceived during the appellate process.

Finally, this Court should reject defendant's claim that without a *de novo* appellate determination of the facts, the rights provided in *Batson* are vain and illusory. By removing the barrier to effective review of peremptory challenges, the *Batson* decision has profoundly changed the jury selection process. The experience since *Batson* demonstrates that the *Batson* rule has given trial and appellate courts the means to combat the improper use of peremptory challenges to disqualify jurors on the basis of race. For example, in the twenty years between *Swain* and *Batson*, only two defendants were able to meet the initial burden of establishing a *prima facie* case of intentional racial discrimination in the selection of the petit jury, and thus to have a court review the prosecutor's reason for exercising peremptory challenges against members of the defendant's racial group. *See McCray*, 750 F.2d at 1120. In the four and one-half years since *Batson*, trial and appellate courts across the country in hundreds of cases have found that the defense met its initial burden of proof and reviewed the prosecution's reasons for exercising challenges.

Batson has done more than simply reduce the defendant's initial burden of proof. Prior to *Batson*, many prosecutors misread *Swain* as authorizing racial assumptions as legitimate bases for peremptory challenges. That misconception no longer exists: *Batson* has made prosecutors across the country sensitive to racial issues which they previously were not required to consider in an individual case. By requiring prosecutors to articulate genuine and truly neutral reasons for their challenges, *Batson* necessarily has reduced both conscious and unconscious racial discrimination in jury selection.

Moreover, the case law reflects that most trial and appellate courts are not accepting at face value the reasons offered by prosecutors for their challenges. At both levels, courts are carefully reviewing the prosecutors' reasons and are rejecting those that are not race-neutral, that are not justified by the

facts of the case and the information obtained about the jurors during *voir dire*, or that are not evenly applied to all jurors, regardless of race. *See, e.g., Chinchilla*, 874 F.2d at 698-99; *Brown*, 817 F.2d at 676; *Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987); *Roman*, 822 F.2d at 228; *Jackson v. State*, 557 So.2d 855 (Ala. Crim. App. 1990); *Gamble*, 257 Ga. 325, 357 S.E.2d 792; *State v. Belnavis*, 246 Kan. 309, 787 P.2d 1172 (1990); *Butler*, 731 S.W.2d 265; *People v. Bozella*, 556 N.Y.S.2d 121 (2d Dep't 1990); *People v. Mack*, 143 A.D.2d 280, 532 N.Y.S.2d 161 (2d Dep't 1988); *Miller-El v. State*, 790 S.W.2d 351 (Tex. App. Dallas 1990).

Many state and federal courts have taken a more expansive view of *Batson* and applied it beyond the original racial context to bar gender discrimination, *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990); *People v. Blunt*, 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990); *People v. Irizarry*, 560 N.Y.S.2d 279 (1st Dep't 1990), and to bar discrimination against identifiable segments of the white population, such as Italian-Americans. *Biaggi*, 853 F.2d 89. Courts have also expanded the requirement of personal standing announced in *Batson* and have applied the *Batson* rule to cases where the defendant was not of the same race or gender as the excluded jurors.[24] *De Gross*, 913 F.2d at 1425; *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92; *Irizarry*, 560 N.Y.S.2d at 280. The rationale underlying *Batson* has been applied to bar criminal defendants from using their peremptory challenges on the basis of race, *De Gross*, 913 F.2d at 1423-24; *People v. Kern*, 75 N.Y.2d 638, 643, 554 N.E.2d 1235, 1236, 555 N.Y.S.2d 647, 648, *cert. denied*, 111 S. Ct. 77 (1990),[25] and has been

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24 The issue of cross-racial standing is before this Court in *Powers v. Ohio*, *cert. granted*, 110 S. Ct. 1109 (1990), which was argued on October 9, 1990.

25 In *Kern*, several white men were charged with the racially motivated killing of one African-American man and the assault upon another in Howard Beach, New York. After the prosecutor objected, the trial court required the defense attorneys to give race-neutral reasons for their peremptory challenges of the African-American jurors. That ruling was upheld on appeal.

held to bar parties in a civil case from exercising peremptory challenges on that basis. *Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir.), *cert. denied*, 110 S. Ct. 149 (1989); *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1309, 1313-14 (5th Cir. 1988).

Thus, the *Batson* rule is being diligently and expansively applied by courts across the country. Application of the long-recognized deferential standard of review to the trial courts' factual findings has had no chilling effect on the meaningful review of *Batson* claims or on the development by appellate courts of the criteria trial courts are to employ to implement the rule. Contrary to defendant's view, an affirmance will not deprive Latinos of the full power and protection to which they are entitled under *Batson*. A number of courts have already acted to prevent discrimination against Latinos in jury selection, *see, e.g., State v. Gonzalez*, 206 Conn. 391, 538 A.2d 210 (1988); *Bueno-Hernandez v. State*, 724 P.2d 1132 (Wyo. 1986), and Latino potential jurors must still be judged by their individual ability to serve, rather than according to impermissible stereotype or bias.

In sum, when reviewing a trial court's *Batson* determination, the state or federal appellate court must first satisfy itself that the prosecutor's reason for each peremptory challenge is, as a matter of law, neutral on its face. Then, if the reason is neutral, the court must review the record, according the trial court's factual findings the same degree of deference ordinarily applied to other findings of fact. As this Court has clearly articulated, the standard for federal courts of appeal, and therefore for this Court's review of *Batson* claims arising in state courts, is "great deference."

Applying these standards, defendant's conviction must be affirmed. As the New York Court of Appeals correctly ruled, a juror's inability to affirm without hesitancy or equivocation that he or she can decide the case based solely upon the admissible evidence is a neutral reason for challenging that juror. Moreover, the record fully supports each lower courts' determination that the challenged jurors were equivocal and

hesitant, that their responses were sufficient to create "grave doubts" about whether they could abide by the translation, and that acceptance of the English interpretation of testimony given in Spanish was, at the time of jury selection, expected to be critical to a fair determination of the facts of this case. Thus, the trial court's determination that defendant failed to prove intentional discrimination is not clearly erroneous and should be affirmed.

CONCLUSION

The affirmance of defendant's conviction by the New York Court of Appeals did not in any way depart from or eviscerate the constitutional guarantee of equal protection of the law reaffirmed in this Court's *Batson* decision. The state appellate court did not sanction peremptory challenges based on race or ethnicity. Nor did that court authorize the exercise of peremptory challenges based on an assumption that in a case involving testimony in Spanish all Spanish-speaking jurors are unable to discharge their duties faithfully and impartially—an abhorrent notion that is contrary to common sense and the teaching of *Batson* that jurors should be selected on the basis of their individual qualifications rather than upon untenable group stereotypes. Rather, the state court merely held, after according due deference to the lower courts' findings of fact, that the prosecutor struck two jurors who had equivocated when asked questions directly probative of whether they would respect their duty to decide the case solely on the admissible evidence, and that this was a permissible reason for the exercise of a peremptory challenge. Because the Court of Appeals applied the appropriate standard of appellate review, and correctly determined that the prosecutor exercised his challenges for a race-neutral, case-related reason, its decision complied with the dictates of the Equal Protection Clause and this Court's decision in *Batson*.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

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January 7, 1991

No. 89-7645

In The

Supreme Court of the United States

October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

PETITIONER'S REPLY BRIEF

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REPLY BRIEF
SUMMARY OF THE ARGUMENT

Petitioner argued in his main brief that the prosecutor peremptorily challenged two prospective bilingual Latino jurors because of their ability to speak Spanish. The prospective jurors were asked a number of questions in the voir dire about their obligation to disregard what they might hear in Spanish from a proposed witness, and to rely only on what the interpreter would say in English. The jurors initially responded that they would try to do this, and ultimately affirmed that they would and could comply. The jurors' initial "I-will-try" responses were the result of the inherent difficulty of the task requested and were caused by the jurors' Spanish language ability. The prosecutor claimed that the jurors' initial "hesitant" responses to the questions were the reason for his exercise of peremptory challenges. The exclusion of these prospective jurors because of their Spanish-language-based "hesitancy" and thus, because of their national origin, is a per se violation of *Batson v. Kentucky*.

In response, respondent argues that there is a difference between *assuming* that all bilingual Latinos will be unable to abide by the court's instructions to accept as final the interpreter's version of the testimony, and *establishing* on the record that individual Latinos might be unable to do so. Thus, respondent attempts to make a distinction between relying on assumptions based on ethnic group traits and establishing the existence of individual traits. In Point I below, petitioner establishes that there is no such distinction in this case. Spanish language ability will cause all potential bilingual Latino jurors to respond to voir dire questions of the type asked here in a

manner similar to the two jurors in this case. There are no distinguishable individual traits discovered by that voir dire questioning, only uniformly held group traits. Thus, all bilingual Latino jurors could be excluded by simply asking the questions of the type asked here.

Nevertheless, respondent argues that a prosecutor can rely on answers to voir dire questions that are tangentially related to race or national origin as the basis of peremptory challenges. Point II of this reply brief, building on Point I, demonstrates that the jurors' responses in this case are not merely tangentially related to Spanish language but are *caused* by Spanish language ability. Thus, whatever merit respondent's arguments might have in other contexts, they are inapposite here. Moreover, to permit the prosecutor to exclude any or all prospective bilingual Latino jurors, at his whim, by eliciting uniform voir dire responses, would result in the exclusion of Latino jurors through a national origin-based classification. To use such a classification respondent must demonstrate a compelling governmental interest. Mere *speculation* that this class of jurors will not accept the English language rendition of Spanish testimony, as asserted by the prosecutor here, is not sufficient.

Point III demonstrates that the prosecutor had no basis to challenge the two jurors because of a suspicion that they would unduly influence the jury as a whole. This case presents no issue for which Spanish language "expertise" is called into play. Nor is there anything in the record to support the prosecutor's suspicion that these jurors would violate their oaths and argue to the jury that the interpreter was wrong.

Finally, Point IV demonstrates that, contrary to respondent's assertions, this Court has consistently exercised independent review in jury discrimination cases to protect inviolable constitutional values. Independent review also is warranted because of the inadequacy of the trial court's fact finding process caused by institutional constraints.

ARGUMENT

POINT I

PETITIONER HAS ESTABLISHED A PER SE VIOLATION OF THE EQUAL PROTECTION CLAUSE AND *BATSON V. KENTUCKY*

Petitioner argued in his main brief that the exercise of peremptory challenges to eliminate the two prospective bilingual Latino jurors in this case was based on the jurors' Spanish language ability and thus their national origin. Respondent agrees that challenges based on national origin or racial group traits rather than the individual characteristics of the challenged jurors would violate *Batson*. Respondent's Brief (hereinafter "R.Br.") at 24. Nevertheless, respondent argues that these jurors were struck for their individual traits. Thus, the parties join issue over whether the jurors' exclusion was caused by their Spanish language ability, a group trait, or by some individual characteristics of the two jurors.

The two jurors were asked a number of questions during the voir dire regarding proposed Spanish language testimony. Although there is no transcript, it is not disputed that, in essence, the jurors were asked if they

could separate out and reject what they would hear in Spanish from the witness and rely only on what they would hear in English from the interpreter. In the first instance the jurors answered these questions by saying that they would try. A3.[1] Ultimately, both jurors affirmed that they would accept what the interpreter said in English. A9-10. The prosecutor nevertheless peremptorily challenged them because of what he characterized as the "hesitancy" of their initial responses. A3-4.

It is evident that the jurors' initial "hesitant" responses to the voir dire questions were caused by their Spanish language ability. Even the New York State Court of Appeals recognized that the jurors' "hesitant" answers were a function of their Spanish language ability. A27-28. In fact, every honest bilingual Latino juror would exhibit the same type of "hesitant" response. The jurors were not excluded because of traits individual to them, but because of a trait shared by all bilingual Latinos, their Spanish language ability.

Respondent does not address what caused the "hesitant" responses. Rather than meet this issue head on, respondent argues:

> There is a difference between *assuming* that all persons who speak Spanish will be unable to abide by the court's instructions to accept as final the English translation of testimony given in Spanish, and *establishing* a basis in the record to suggest that individual Spanish-speakers might be unable to do so.

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[1] As in petitioner's main brief, references to the Joint Appendix will be by "A" and the page number.

R.Br. at 24 (emphasis in original) However, that distinction does not exist in this case because it is a juror's Spanish language ability that *causes* the initial "hesitancy" in answering questions about interpreters. Such "hesitancy" can always be established. All a prosecutor has to do is ask the questions: "Can you disregard everything that you hear the witnesses say in Spanish? Even if you hear something different in Spanish from what the interpreter says, can you disregard it?, etc." The bilingual jurors faced with this confusing request must then quickly consider whether they can listen to clearly understandable testimony then behave as if it had never been spoken, accepting instead a translator's rendition of what was said. Honest bilingual jurors will show some uncertainty about their ability to do this. Thus, there is no difference between *assuming* that all bilingual Latino jurors will have difficulty disregarding what they heard in Spanish and *establishing* through questions that bilingual jurors will have this difficulty. The answers to the voir dire questions do not reveal any *individual* traits of the juror. Indeed, they expose uniformly held national origin based traits.

Therefore, the central question that separates the parties is whether this national origin trait, Spanish language ability, *causes* bilingual Latino jurors to experience difficulty in completely disregarding what a witness testifies to in Spanish.[2] If it does, it is a "group" trait and cannot

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[2] This issue is a very unique *Batson* issue. As the prosecutor at the trial acknowledged, the jurors were willing to follow the court's instructions about interpreters; it was a question of whether they would be able to do this. The prosecutor said: "I

be relied upon by prosecutors in exercising peremptories. If on the other hand, the difficulty evidenced by the jurors in this case was individual to them and not universally shared by other bilingual Latinos, respondents would argue that it can be relied upon by prosecutors to the extent that they can demonstrate it exists in individual Latino jurors.[3]

As a matter of linguistics, empirical research, experience and common sense, bilingual jurors' Spanish language ability will cause them to show some uncertainty over their ability to simply disregard what they hear in Spanish from the mouth of the witness. Significantly, both jurors here exhibited what the prosecutor characterized as "hesitancy" in answering questions about the interpreter. Therefore, what the prosecutor's questions revealed was not some individual characteristic but a group trait.

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believe in their heart they [the jurors] will try to follow it [the interpreter's English language version of the testimony]" * * * "I feel very uncertain that they would be able to listen and follow the interpreter." A3. Thus, the jurors were excluded not because of any expressed unwillingness to follow the court's instructions but because of their honestly expressed difficulty to do so, caused by their Spanish language ability.

[3] It is irrelevant if jurors express different levels of difficulty as respondent suggests. ("It is likely that different individuals will have more or less difficulty in accepting the official interpretation of the testimony depending, for example, upon their relative degrees of fluency in English and Spanish." R.Br. at 27-28.) Differing responses may play some role in a court's determination whether to grant a challenge for cause; but as long as "hesitancy" is a justification for peremptory challenges, prosecutors can point to *any* level of "hesitation" to support the removal of bilingual Latino jurors.

An extensive empirical study of the issue has found that bilingual jurors have great difficulty in not registering what a witness says in Spanish.[4] The study found the Latino jurors were influenced both by what they heard in Spanish and what the interpreter said.[5] This was true even though the interpreting was accurate.[6]

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[4] Berk-Seligson, Susan, *The Bilingual Courtroom*, Univ. of Chicago Press (1990) at 167-168 (1990).

[5] *Id.* at 194 ("Clearly the impact of the interpreter is greater on non-Hispanic listeners. They must rely entirely on the English rendition of the interpreter to be able to understand a witness's testimony. Hispanic listeners do tune in to the Spanish source testimony; however, they are also to a large degree affected by the interpreter's version of the testimony as well.").

[6] *Id.* at 158-164. The study used 551 mock jurors of whom 40% were bilingual Latinos. The participants heard tape recordings of mock testimony of a single Spanish speaking witness in which the interpreter always accurately interpreted. The jurors were asked to rate the witness on the factors, inter alia, of convincingness, trustworthiness, competence and intelligence. The jurors were broken up into two groups both including Latinos and non-Latinos. One group heard a tape recording in which the interpreter would, for example, say "yes, sir" using the polite form of the witness' response, "sí, señor", while in the tape recording heard by the other group the interpreter would simply say "yes." This minor difference caused non-Latinos in the second group, relying only on the interpreter, to find that the witness whose testimony was interpreted without the politeness markers to be less convincing, less competent, less intelligent and less trustworthy than did non-Latinos in the first group who heard the interpreter's politeness markers. On the other hand Latinos in both groups of jurors, who heard the witness' original, "sí, señor", were not affected to the same degree by the interpreter as non-bilingual jurors. The Latinos in the two groups found the witness equally convincing and trustworthy. However, on the factors of competence and intelligence, the Latino jurors were obviously influenced by the interpreter;

The study's findings are consistent with both experience and common sense. Bilingual jurors cannot simply disregard what a witness' actual words are even when the interpreter does a masterful job in interpreting. They cannot shut down their Spanish language system. The jurors necessarily receive two inputs, one in Spanish and one in English. Thus, bilingual jurors, when questioned about their ability to disregard what the witness actually said and consider only what the interpreter said, have to acknowledge the difficulty of the task. The ability to separate out and disregard something heard is inherently difficult. This Court needs no empirical study to conclude that jurors may have difficulty in disregarding statements heard at a trial when instructed to do so. *See, Bruton v. United States*, 391 U.S. 123 (1968), (without citing an empirical study, Court found jury difficulty in disregarding trial testimony); *Jackson v. Denno*, 378 U.S. 368, 388-389 (1964); *id.* 378 U.S. at 402 (Black, J., dissenting in part and concurring in part) (criticizing majority finding of jury difficulty in disregarding a coerced confession because there were "no statistics . . . available, and probably none could be gathered" to support this conclusion).

It is particularly difficult for bilingual persons to separate out information based on the language in which it is heard. It has been found that when bilingual Latinos are provided information in two alternating languages, they are often unable to recall the language in which they

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those in the second group ranked the witness' testimony less favorably when the interpreter did not include the politeness markers. Thus, Latino jurors were influenced both by the witness' own words and the interpreter.

heard different parts of the information.[7] Anyone who has observed bilingual Latinos speaking with each other has noticed that they go back and forth between Spanish and English, often within the same sentence. At the end of the conversation, not surprisingly, they cannot recall in what language they learned some information.

Even when bilingual Latinos can identify differences between what is heard in Spanish and English, it is not easy to disregard the witness' own words. For example, as in the Berk-Seligson study, see *supra* at footnotes 4-6, the differences may be as slight as an interpreter not including the word "sir" as part of a witness' answer. Can bilingual jurors disregard that the juror said, "sí, *señor*"? The difference does not affect the substance of the witness' testimony but may influence a juror's evaluation of the trustworthiness of the witness. *Id.* The courts would require a bilingual juror to disregard the fact that the witness said "señor" in his or her answer, as well as more substantial variations of the interpreter's words from the Spanish language testimony. A juror faced with a question of this type will initially respond, as the jurors did in this case, "I will try."

The two bilingual Latino jurors in this case are just like every other bilingual person. They honestly acknowledged their difficulty in disregarding what they would

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[7] Magiste, *The Competing Language Systems of the Multilingual: A Developmental Study of Decoding and Encoding Processes*, 18 Journal of Verbal and Learning Behavior, pp. 79-89 (1979). See generally, Amici Curiae Brief of the Mexican American Legal Defense and Educational Fund and the Commonwealth of Puerto Rico, etc. at pp. 11-13.

hear in Spanish for what the interpreter might say, a difficulty caused by Spanish language ability, although both ultimately affirmed that they would abide by the interpreter's English version of the testimony. These jurors were excluded because they understood Spanish. If the decision below is allowed to stand, any prosecutor, with a mind to, can strike any and all bilingual Latino jurors on the same basis.

POINT II

THE RIGHTS OF LATINOS TO SERVE ON JURIES OUTWEIGH ANY INTEREST THAT THE RESPONDENT MAY HAVE IN EXCLUDING THEM

Petitioner has established the clear connection between the prosecutor's challenges in this case and the Latino jurors' Spanish language ability. *Batson* would serve little purpose if, in order to overcome a prima facie case, a prosecutor could rely on an integrally related national origin trait to explain his or her exercise of a peremptory challenge. It must be treated as a per se violation.

Respondent urges this Court to create an exception to the clear import of *Batson*. The State argues that if the juror evidences some basis for a peremptory challenge that is "tangentially related" to race or national origin, a prosecutor can permissibly exercise a peremptory challenge. See, R.Br. at 29. That argument was specifically addressed in *Batson*, which held that the unfettered use of peremptory challenges must give way to the equal protection clause. *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986). A juror's national origin cannot be the basis for a peremptory challenge.

Here the peremptory challenges were based on a group-held characteristic and not one that varies from one bilingual Latino to another. It is difficult to conceive of other traits, as integrally linked with ethnicity as language, which would have the same uniform causal relationship to a juror's responses to voir dire questions. This case is distinct from the examples and hypotheticals discussed by respondent involving African Americans. Being black does not cause all African American jurors to express doubts about the ability of white witnesses to identify African American defendants, nor to doubt the word of a witness who uses racial epithets. R.Br. at 30-31. While being black is somehow related to those kinds of juror biases, it does not uniformly cause certain types of responses to voir dire questioning.

Moreover, and of equal importance, the voir dire questioning and potential bases for peremptory challenges in the circumstances referred to in respondent's examples (i.e., where there is an issue of cross-racial identification or an issue of the credibility of a racist witness) are case specific. That is, any juror bias revealed by questioning will concern issues of contested fact at trial. On the other hand, here the peremptory challenges of bilingual Latinos based on their Spanish language ability are not case specific. Neither party has put in issue, as a question of contested fact, the meaning of specific Spanish language evidence.[8] The prosecutor's

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[8] As discussed fully in Point III, Spanish language issues can only arise when there is a dispute over the correct translation of an out-of-court statement. Similar issues are not presented by in-court statements.

challenges are akin to generalized race-based challenges of the type found impermissible by *Batson*.

Respondent's examples are also distinguishable because they involve some showing of "specific bias" or outcome determinative bias by the juror – the type of showing that is required by several state courts to demonstrate that a challenge is nondiscriminatory. See, Petitioner's Brief at Point I(D) p.25. Here, the bilingual Latino jurors would be struck without any showing of bias for the defendant or against the state. Thus, the challenges do not serve the central purpose of peremptory challenges, which is to remove persons who may not be impartial. *Holland v. Illinois*, 493 U.S. ___, 107 L.Ed.2d 905, 919 (1990).

The logical extension of respondent's position is that even if all bilingual jurors will provide "hesitant" answers to voir dire questions about the interpreter, they can all be excluded from the jury. Respondent would establish a class of bilingual Latino jurors who could be excluded anytime there is or may be testimony in Spanish. Under respondent's theory these jurors can essentially be treated as unqualified and all can be removed from juries without violating the equal protection clause. Such a position cannot withstand the strict scrutiny of the equal protection clause.

Under standard equal protection analysis, classifications based on national origin or which impinge on fundamental rights[9] must be supported by a compelling

[9] Penalizing bilingual Latino jurors based on their Spanish language ability impermissibly burdens their fundamental right to learn and speak Spanish. *See, Meyer v. Nebraska*, 262 U.S. 390 (1923); *cf. Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

governmental interest.[10] However, respondent has not demonstrated a compelling state interest in excluding bilingual Latino persons from jury service. Respondent has only stated that there is reason to suspect that this class of jurors may not disregard what they hear in Spanish.[11] The respondent must show more than ethnicity-based "speculations." *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (even legislative speculations that Chinese merchants were failing to pay their taxes were an insufficient basis to require all ledger books to be kept only in English, Spanish or native Filipino languages); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (speculations and generalized assertions of racial discrimination were insufficient to support race based classifications).[12]

[10] *Loving v. Virginia*, 388 U.S. 1 (1967); *see also, McLaughlin v. Florida*, 379 U.S. 184 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944).

[11] It is assumed that all these jurors will do what they have been instructed to do despite the difficulty. *See, Bruton.*

[12] A classification based on race or national origin "bears a heavy burden of justification . . . and will be upheld only if it is *necessary*, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin*, 379 U.S. at 196 (emphasis added). However, in conducting a voir dire examination, a trial court's refusal to ask prospective jurors whether any of them spoke Spanish fluently is not an abuse of discretion. *See United States v. Gonzalez-Benitez*, 537 F.2d 1051, 1053 (9th Cir. 1976) (Kennedy, J., writing for the court), *cert. denied*, 429 U.S. 923 (1976). Therefore, the use of peremptories based on such discretionary information cannot rise to the level of a compelling state interest.

Latinos by virtue of their language may not be excluded at the whim of the prosecutor because as this Court has stated:

> [I]t denies the class of potential jurors the "privilege of participating equally . . . in the administration of justice," . . . and it stigmatizes the whole class, even those who do not wish to participate by declaring them unfit for jury service and thereby putting "a brand upon them, affixed by law, an assertion of their inferiority."

Peters v. Kiff, 407 U.S. 493, 499 (1972) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

Respondent's position is particularly suspect because there is a nondiscriminatory alternative to the exclusion of bilingual jurors. *See, City of Richmond v. Croson*, 488 U.S. at 507. Respondent's concern could be addressed by allowing any disputes over the correct interpretation to be resolved by the judge. It is a procedure that is currently used in the New York courts. *See, Santana v. New York City Transit Authority*, 132 Misc. 2d 777, 505 N.Y.S.2d 775 (N.Y. Sup. Ct. 1986).[13]

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[13] Respondent speculates that these two jurors might not go to the judge with disputes and therefore this practice would not have answered the prosecutor's concern. However, there is nothing in the record to support such speculation. The jurors were not asked whether they would or could follow an instruction of this type. Certainly Spanish language ability does not create difficulty in complying with this instruction, as it did with the instructions at issue. These jurors evidenced no specific or general unwillingness to comply with the rules of the Court. Respondent must show more than a mere non-record-based speculation to establish that this alternative would not be effective.

Therefore, under traditional equal protection analysis, all bilingual Latino jurors may not be excluded from jury service even if all of them give "hesitant" responses to voir dire questions about following the interpreter. No compelling state interest is served by their exclusion.

POINT III

ISSUES OF UNDUE JUROR INFLUENCE ARE NOT PRESENTED BY THIS CASE

The court below found that the prosecutor's neutral reason for the exclusion of the two bilingual Latino jurors was his belief that the jurors would not follow the interpreter. A31. Respondent argues in addition that the two Latino bilingual jurors were peremptorily challenged because they would have an undue influence on the jury as a result of their expertise in the Spanish language. However, this case does not involve an issue in which Spanish language expertise plays a role. Nor is there anything in the record to support respondent's assertion.

Only when the prosecution and the defense offer conflicting translations of out-of-court statements does an issue involving Spanish language expertise arise. In such cases, after listening to the tape recording of the out-of-court statement in Spanish, reviewing the disputed versions of the translations, and hearing the testimony of the persons who translated it, the jury would decide as matter of fact what was said. *See e.g., United States v. Zambrana*, 841 F.2d 1320, 1335-1339 (7th Cir. 1988); *United States v. Carbone*, 798 F.2d 21, 26 (1st Cir. 1986); *United States v. Llinas*, 603 F.2d 506, 509-510 (5th Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980). A bilingual juror might have greater influence than non-bilingual jurors in persuading

the jury as to the meaning of the disputed Spanish language statement. Only in this limited situation would the juror's language expertise come into play.

This case involved proposed in-court testimony in Spanish. There was no issue presented that required Spanish language expertise. It is unlike respondent's examples of doctors serving as jurors in cases with complex medical issues, or psychiatrists where there are claims of insanity, or accountants in tax-evasion cases. Moreover, this is unlike *State v. Pemberthy*, 224 N.J. Super. 280, 540 A.2d 227, *appeal denied*, 111 N.J. 633, 546 A.2d 547 (1988 where the translation of out-of-court statements was at issue. *And see, United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990).

Nevertheless, respondent speculates that one or both of the excluded Latino jurors would argue to the other jurors that a witness said something in Spanish that was different from the interpreter's rendition. There is nothing in the record that could support such a suspicion. The jurors' voir dire statements only indicated an apparent difficulty in separating out what they may hear in Spanish and relying on only what they hear in English. This difficulty should not be taken as an indication of a general unwillingness on the part of the jurors to follow the court's instructions, as the prosecutor would have us believe. The record does not show that jurors were asked whether they could refrain from arguing to the jury that a witness' testimony differed from what the interpreter said. Nor does the record show that the jurors were hesitant in response to questions about this instruction. The prosecutor cannot assume that because a juror's Spanish language ability may cause some difficulty in

following one court rule, that he or she will in all instances not follow the court's instructions.

Thus, respondent's argument is nothing more than an unfounded speculation that these jurors would violate their oaths and seek to persuade the jury that the interpreter is wrong. None of the courts below relied on this suspicion in their findings.

POINT IV

THE ULTIMATE DETERMINATION OF THE CONSTITUTIONALITY OF THE VOIR DIRE MUST BE INDEPENDENTLY REVIEWED TO PRESERVE EQUAL PROTECTION VALUES FUNDAMENTAL TO OUR DEMOCRATIC SOCIETY AND TO ENSURE THE APPEARANCE AND REALITY OF JUSTICE

In order to ensure a racially unbiased criminal justice system, this Court should assign the ultimate question of the constitutionality of the voir dire process to the independent judgment of the appellate courts. Independent review requires the appellate court to accept the findings of historical fact and credibility of the lower court unless they are clearly erroneous. Then, based on these facts, the appellate court independently determines whether there has been discrimination. Contrary to the respondent's assertions (R.Br. at 42), this Court has consistently provided independent review in jury discrimination cases. As this Court clearly explained in *Cassell v. Texas*, 339 U.S. 282, 291-292 (1949):

> A claim that the constitutional prohibition of discrimination was disregarded calls for ascertainment of two kinds of issues which

ought not to be confused by being compendiously called "facts." The demonstrable, outward events by which a grand jury came into being raise issues quite different from the fair inferences to be drawn from what took place in determining the constitutional question: was there a purposeful non-inclusion of Negroes because of race or a merely symbolic representation, not the operation of an honest exercise of relevant judgment or the uncontrolled caprices of chance?

This Court does not sit as a jury to weigh conflicting evidence on underlying details, as for instance what steps were taken to make up the jury list, why one person was rejected and another taken, whether names were picked blindly or chosen by judgment. This is not the place for disputation about what really happened. On that we accept the findings of the State court. But it is for this Court to define the constitutional standards by which those findings are to be judged. Thereby the duty of securing observance of these standards may fall upon this Court. *The meaning of uncontrovertible facts in relation to the ultimate issue of discrimination is precisely the constitutional issue on which this Court must pass.*

Id. (citation omitted) (emphasis added). Thus, the responsibility for determining the ultimate question of jury discrimination has consistently been resolved by the independent review of the appellate courts.

This is precisely the same allocation of judicial functions traditionally required in other instances where there is an overriding need to protect constitutional values that safeguard not only the rights of the immediate parties, but the very tenets of our democratic system, *e.g.*, *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S.

___, 105 L.Ed.2d 562, 589 (1989) ("In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of witnesses,' the reviewing Court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' ") (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499-500 (1984) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)); *Miller v. Fenton*, 474 U.S. 104, 112 (1985) (while subsidiary facts are to be given the presumption of correctness, "the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirement of the Constitution is a matter for independent federal determination."); *cf. Maggio v. Fulford*, 462 U.S. 111, 118 (1983) (White, J., concurring). Respondent does not even address the import of these cases.

Because a racially unbiased criminal justice system is an unalterable prerequisite to a truly democratic and just society, independent review should be maintained in all jury discrimination cases. "The basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.' " *Batson*, 476 U.S. at 84 n.3 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 (1972)). The standard of review should also be the same.

In addition to the constitutional reasons for independent appellate review, there are the institutional problems that interfere with the proper resolution of *Batson* issues at the trial level. As stated by Justice Mosk of the California Supreme Court:

> Even the most conscientious trial judge can be misled by such extraneous pressures as a reluctance to dismiss the venire after some or all of the jurors have been seated, or a felt urgency to begin taking testimony in a trial expected to be lengthy, or a natural disinclination to disbelieve assertions of good faith made by an attorney in open court. An appellate court, of course, is removed from such pressures.

People v. Johnson, 47 Cal. 3d 1194, 1291, 767 P.2d 1047, 1105, 755 Cal. Rptr. 569, 627 (1989) (Mosk, J., dissenting), *cert. denied*, 110 S. Ct. 1501 (1990

Contrary to respondent's assertions, independent review is essential to prevent *Batson*'s promise of justice from being transformed into the legacy of failure realized in *Swain v. Alabama*, 380 U.S. 202 (1965).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIONISIO HERNANDEZ

Petitioner,

vs.

STATE OF NEW YORK

Respondent.

On Writ of Certiorari to the
Court of Appeals of New York

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Movants U.S.ENGLISH, Inc. and U.S.ENGLISH Foundation, Inc., District of Columbia non-profit corporations, respectfully move for leave to file the attached brief amici curiae in this case. Neither counsel responded to requests for permission to file this brief.

Movants have been the principal proponents of initiatives and legislative efforts to designate English as the official language of fifteen of the eighteen states which now have constitutional or statutory designations of an official language. In addition, Movants are involved in nationwide activities involving choice of language, including efforts to protect the rights of all Americans to have English as the language of government.

Movants are, therefore, uniquely suited to illustrate for the Court the potential ramifications of this case beyond those presented by the parties. A decision by this Court which equates language with national origin will harm Movants' efforts. Movants believe that their discussion of the effects of such a decision will aid the Court in determining its decision in this case.

Respectfully submitted,

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PROPOSED BRIEF AMICI CURIAE OF U.S.ENGLISH, INC. AND U.S.ENGLISH FOUNDATION, INC. IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Because Amici Curiae are not certain whether the following question is clearly included within the questions presented in petitioner's brief, Amici respectfully suggest that Question 1 presented in this case fairly includes the following question:[1]

Whether the language spoken by a person can be equated, *per se*, with the person's national origin?

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1 *See, e.g.*, restatement in Petitioner's Brief, Pp. 20-21: "While there may be reason to challenge the credibility and the good faith of a prosecutor who relies on reasons like the one offered in this case, it is not necessary to do so. It is sufficient that this Court find that the proferred reasons are based on Spanish language ability and thus national origin. It is a *per se* violation of the [sic] *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] and the Fourteenth Amendment."

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INTEREST OF AMICI CURIAE

Amici U.S.ENGLISH, Inc. and U.S.ENGLISH Foundation, Inc. (together U.S.ENGLISH) are District of Columbia non-profit corporations. U.S.ENGLISH, Inc. is a social welfare action organization exempt from taxation under I.R.C. § 501(c)(4); U.S.ENGLISH Foundation, Inc. is a charitable and educational organization exempt from taxation under I.R.C. § 501(c)(3). Together amici have more than 350,000 members nationwide, with a Board of Advisors including former U.S. Senators S.I. Hayakawa, Eugene McCarthy and Barry Goldwater, and broadcaster Alistair Cooke.

Amici have two goals: to protect English as the official language of the United States; and to provide an opportunity for every American to learn English.

The interest of amici in this case arises from their on-going efforts to protect English as the official and common language of the United States and of the various States. Amici have been the principal proponents of initiatives and legislative efforts to designate English as the official language of fifteen of the eighteen states which now have constitutional or statutory designations of an official language. *See, e.g.*, Zall/Jimenez, *Official Use of English: Yes/No*, 74 A.B.A. J. 34-5 (1988) [hereinafter "Zall/Jimenez"]. Amici believe that "official language statutes ensure the preservation of English as our common language . . . without infringing individuals' rights." *Id.* at 34.

In addition, amici are involved in nationwide activities involving choice of language, including efforts to protect the rights of all Americans to have English as the language of government. Amici, for example, have participated in other language-related cases before this

Court. *See, e.g., Municipal Court v. Gutierrez*, ___ U.S. ___, 109 S.Ct. 1736 (1989); *Delgado v. Smith*, ___ U.S. ___, 109 S.Ct. 3242 (1989).

Amici are concerned that a decision by this Court which equates language with national origin will harm their efforts. Amici are in a unique position to inform the Court of the possible effects of such a decision. Amici, therefore, believe that they may be directly affected by this Court's decision in this case and that their discussion of the effects of such a decision will aid the Court in determining this case.

PRELIMINARY STATEMENT

U.S.ENGLISH opposes unlawful discrimination in any form, including unlawful discrimination based on language ability. U.S.ENGLISH supports this Court's efforts to eliminate unlawful discrimination from the judicial process.

As the Court noted, however, in *Holland v. Illinois*, ___ U.S. ___, 110 S. Ct. 803 (1990), "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Id.* at 811.

Petitioner seems to believe that in every situation the language a person speaks can be equated to that person's national origin.[2] Amici express no view on

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2 *See, e.g.,* Petitioner's Brief [hereinafter Pet. Br.] 6 ("Language based reasons are integrally linked to national origin. Therefore, the prosecutor's explanation was a *per se* violation of the Equal Protection Clause."); Pet. Br. 11 ("Because of the integral relationship between speaking Spanish and being Latino, a decision based on Spanish language is tantamount to a decision based on Latino national origin."); Pet. Br. 11-12 ("facially discriminatory reason and a *per se* violation of *Batson* [*vs. Kentucky,* 476 U.S. 79 (1986)] and the Fourteenth Amendment."); Pet. Br. 20; Pet. Br. 20-21; Pet. Br. 27.

whether, in this case, the prosecutor's rationale for striking potential jurors was based on national origin, but file this brief only to urge this Court to reject a general absolute rule equating language with national origin. Such an absolute "*per se*" equation would be without a basis in law or fact, and would be unworkable and unwise.

STATEMENT OF CONTEXT

Conflicts over language have been part of American politics since the founding of the country. D. Simpson, *The Politics Of American English, 1776-1850* (1986). Today eighteen states have constitutional provisions or statutes designating English as the official language.[3]

These "official language" laws are intended, in part, to limit governments' use of languages other than English for official activities. These laws are a reaction, in part, to a growing clamor for government activities and services in languages other than English. "It is not

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3 The States and the dates they enacted the designation are: Alabama: ALA. CONST. AMEND. 509 (1990); Arizona: ARIZ. CONST. ART. XXVIII (1988); Arkansas: ARK. STAT. ANN. 1-4-117 (1987); California: CAL. CONST. ART. III, § 6 (1986); Colorado: COLO. CONST. ART. II, § 30 (1988); Florida: FLA. CONST. ART. II. § 9 (1988); Georgia: 1986 Ga. Laws 529 (1986); Hawaii: HAWAII CONST. § 4 (1978); Illinois: ILL. REV. STAT. CH. 1, § 3005 (1969); Indiana: IND. CODE. CH. 10, § 1 (1984); Kentucky: KY. REV. STAT. § 2.013 (1984); Mississippi: MISS. CODE ANN. § 3-3-31 (1987); Nebraska: NEB. CONST. ART. I, § 27 (1920); North Carolina: N.C. GEN. STAT. CH. 145, § 11 (1987); North Dakota: N.D. CENT. CODE, § 54-02-13 (1987); South Carolina: S.C. CODE ANN. § 1-1-(696-698) (1987); Tennessee: TENN. CODE ANN. § 4-1-404 (1984); and Virginia: VA. CODE § 22.1-212.1 (1986).

government's role to maintain other languages and cultures; these valuable traditions can be best kept alive by private organizations and individuals, not by government." Zall/Jimenez, *supra*, at 34. *See also* Zall & Stein, *Legal Background and History of the English Language Movement* in D. Adams & D. Brink, *Perspectives On Official English* 62-63 (1990).

Debates about the language of government often reach the ballot; last June, 89% of Alabama's voters approved a new constitutional amendment declaring English the official language of that state. *Voters OK English Language Amendment,* Montgomery Advertiser, June 7, 1990, at A2, col. 2.

A portion of that battle also is being waged in American courts. Here are some examples of recent cases involving constitutional and statutory claims to specific rights or services based on the language a person speaks:

LANGUAGE OF GOVERNMENT ACTIVITIES:

Recently the U.S. District Court for the District of Arizona held the Arizona constitutional provision declaring English the official language of Arizona was void for violating government employees' asserted First Amendment rights to take official actions in languages other than English. *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990). The decision, which the District Court later said was not binding on state courts, *Yniguez v. Mofford*, 130 F.R.D. 410, 416 (D. Ariz. 1990), may be appealed if either the initiative proponents or the Arizona Attorney General are allowed to intervene after judgment. *Arizonans for Official English v. Yniguez*, Nos. 90-15546 and 90-15581 (9th Cir. filed July 25, 1990).

Yniguez was the first case to find a constitutional right to governmental action in a language other than English. Other cases have held that neither civil service examinations nor official notices need to be in languages other than English. *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)(State had compelling interest in giving civil service examination only in English); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984)(official notices only in English not discriminatory); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973)(same); *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, *cert. denied*, 459 U.S. 806 (1982)(same); *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 414 U.S. 1137 (1974)(same); *Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904 (1975)(same).

LANGUAGE OF THE COURTROOM:

Language-related issues involving courtroom procedures are probably most acute in Puerto Rico, where the majority of the population does not speak English. *United States v. Ramos Colon*, 415 F. Supp. 459, 462 (D.P.R. 1976)(three-judge court). Yet, the United States District Court in Puerto Rico has consistently held that courtroom proceedings should be conducted in English. *Id.* at 465; *United States v. Valentine*, 288 F. Supp. 957, 963-64 (D.P.R. 1968). As the three-judge court in *Ramos Colon* said:

> [T]he use of English in its proceedings, and the language qualification requirements of jurors which follow as the logical consequences thereof, is not merely a question of convenience or practicality but is a constitutional imperative in that English being the constitutional language of the United States and of its Institutions, [citing to *Olivo* and *Carmona*] the use of said language in its proceedings ceases to be a question of adjective law but is a matter of constitutional substance. Leaving aside the almost insurmountable practical considerations . . . that would be prompted by any legislation that permitted non-English as an official language in constitutional proceedings, we express, without of course deciding at this time, serious reservations as to their possible validity as applied by any Article III court, even were such legislation to be uniformly applicable to all such courts throughout the Federal jurisdiction.

Ramos Colon, 415 F. Supp at 465-66. [4]

In *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), the Second Circuit held that a non-English speaking defendant had a Sixth Amendment right to a translator in a criminal case because otherwise he would not be "present at his own trial." 434 F.2d at 389. *But see United States v. Benmuhar,* 658 F.2d 14 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982)(Sixth Amendment permits English-language requirement for jurors); *Jara v. San Antonio Municipal Court*, 21 Cal. 3d 181, 578 P.2d 94, 145 Cal. Rptr. 84 (1978), *cert. denied*, 439 U.S. 1067 (1979)(no constitutional right to appointed interpreters at public expense for represented litigants).

LANGUAGE OF EDUCATION:

In *Lau v. Nichols,* 414 U.S. 563 (1974), this Court held that the San Francisco School Board's failure to provide at least some language assistance to non-English-speaking students violated those students' statutorily-protected civil rights. *But see Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978)(no right to bilingual/bicultural education).

LANGUAGE OF THE WORKPLACE:

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4 *See also* the extensive historical analysis in *Valentine*, 288 F. Supp. at 963-65.

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 2120 (1989), this Court failed, for lack of proof of disparate impact, to find discrimination despite an attack on, *inter alia,* an English-language hiring rule. *See also NLRB v. Precise Castings Inc.*, 915 F.2d 1160 (7th Cir. 1990)(union representation ballots and election materials need not be in languages other than English); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(requirement to speak English on the job not discriminatory as applied to bilingual person); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)(same); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982)(upholding English-on-the-job rule for non-English-speaking truck drivers).

LANGUAGE OF POLITICAL ACTIVITIES:

Both the Tenth and Eleventh Circuits, in *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1740 (1989), and *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *cert. denied*, ___ U.S.

___, 109 S.Ct. 3242 (1989), held that initiative petitions need not be printed in languages other than English in areas covered by the bilingual ballot provisions of the Voting Rights Act.

Petitioner here requests a *per se* rule equating the language spoken by a person with the person's national origin.[5] None of the cases listed above found such an equation, nor has this Court ever enunciated such an equation.[6]

Such an absolute rule, although here offered in the context of discrimination in jury selection, inevitably will affect the myriad language-choice conflicts faced by American courts. It would be difficult to fashion a national origin-based test for this case which would not be imported to all of the categories described above.

The danger which amici wish to bring to the attention of the Court is that announcing a definitive rule equating language with national origin will have ramifications well beyond this case, and should not be made in this case. Amici hope, for the reasons

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5 *See* Note 2.

6 Apparently for lack of other support, Petitioner continues what is a growing, but unfortunate trend in language-related cases by citing two vacated cases. Pet.Br. 11, 20, *quoting Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 109 S.Ct. 1736 (1989), and *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986), *vacated*, 484 U.S. 806 (1987). These vacated cases did find some equation of language-related rules and classifications and national origin. Similar citations to these cases have been made in briefs *and at least one opinion* in language-related cases. *See Asian Am. Business Group v. Pomona*, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989). Vacated cases have no legal effect and should not be relied upon or cited. *United States v. Munsingwear*, 340 U.S. 36, 41 (1950).

described below, that the Court will reject Petitioner's proposed *per se* rule as unfounded in law or fact, unworkable, and unwise.

SUMMARY OF ARGUMENT

Petitioner seeks, in part, an absolute rule equating a person's ability to speak a language with that person's national origin. Such a "*per se*" rule has no basis in law or fact, would be unworkable in practice, and would inject this Court into a highly political controversy over the proper role of government in choice of language.

Unfounded in Law or Fact

There is no support in the language, history or application of the Fourteenth Amendment to support a *per se* rule equating language and national origin. The ordinary definitions of national origin involve a person's ancestry, which may or may not reflect the language a person speaks. Thus, since language does not necessarily represent ancestry, a rule equating language and national origin would be both over- and under-inclusive.

In addition, language is not an immutable characteristic, like the place a person's ancestors were born. Language is more like alienage, which may be temporarily static, but which is ultimately mutable.

Unworkable

This case is not about only Spanish or Hispanics, but about the use of one language – English – as opposed to many languages. Hundreds of languages are spoken in this diverse country, and each would have an equivalent claim to special consideration.

Although Petitioner cites possible error by a court-appointed interpreter as a reason for ignoring language issues in a jury, the possibility of erroneous understanding by an untrained juror is both more likely and more ominous. Courtroom interpreting is a difficult art

and a juror who relies on his or her own interpretation at the expense of the official translation may have both undue and erroneous influence during jury deliberations.

Unwise

This Court should be reluctant to adopt a *per se* rule equating language and national origin to avoid influencing cases in contexts other than jury selection and to avoid involvement in on-going political controversies.

ARGUMENT

I. A *PER SE* RULE EQUATING ABILITY TO SPEAK A LANGUAGE WITH NATIONAL ORIGIN HAS NO BASIS IN LAW OR FACT, AND WOULD BE UNWORKABLE AND UNWISE.

A. A *Per Se* Rule Equating Language and National Origin Has No Basis in Law or Fact.

1. A Per Se Rule Equating Language and National Origin Has No Basis in Law.

Petitioner claims that a potential juror's ability to understand a language is identical to the potential juror's national origin under the Fourteenth Amendment. The language, history and interpretations of the Fourteenth Amendment and other federal laws do not support equating, *per se*, language and national origin.

Statutory Language:

The Fourteenth Amendment does not include the phrase "national origin." Nevertheless, there is no doubt that discrimination by States on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 n.5 (1987). "Distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

No Federal statute defines "national origin." This Court has noted that the legislative history concerning

the meaning of national origin, even under statutory law, is "quite meager." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *see also Garcia*, 618 F.2d at 268 n. 2.

Legislative History:

Legislative history provides little support to a language-based definition of national origin. During debate on the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, Representative Roosevelt stated: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2,549 (1964).

This Court supports that assessment: "(t)he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88; *See also Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-3 (9th Cir. 1988)(Persons of Serbian national origin are members of a protected class under Title VII). "The terms 'national origin' and 'ancestry' were considered synonymous." *Espinoza*, 414 U.S. at 89.

Administrative Interpretations:

The Equal Employment Opportunity Commission, by regulation, has found that language minorities constitute a protected class under the employment discrimination statutes. 29 C.F.R. § 1606.1 (1990). Yet that regulation has never been tested in this Court, does not necessarily apply to the Fourteenth Amendment, and, under *Espinoza*, does not bind this Court. 414 U.S. at 94-95.

Judicial Interpretations:

This Court has never held that the language a person speaks can be equated, for Fourteenth Amendment purposes, with the person's national origin.[7] In *Lau v. Nichols*, 414 U.S. 563 (1974), this Court did not review the Equal Protection question, deciding instead on grounds derived from statute and regulation. 414 U.S. at 566.

The Courts of Appeal also have never equated language with national origin under the Fourteenth Amendment:[8]

> A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984). "A policy in-

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7 Petitioner cites *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), to support the equation of language and national origin, but that case involved intentional discrimination on the basis of ancestry rather than language, because the law there was designed "to affect [Chinese merchants] as distinguished from the rest of the community." 271 U.S. at 528.

8 One Court of Appeals did find a language-based right to an interpreter at criminal trials, but based the right on the Sixth Amendment. *Negron*, 434 F.2d at 389. Absent an interpreter, the Second Circuit found in *Negron*, the defendant would not be "present at his own trial."

volving an English requirement, without more, does not establish discrimination based on race or national origin." *An v. General Am. Life Ins. Co.*, 872 F.2d 426 (9th Cir. 1989)(table; text in WESTLAW); "The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin." *Garcia*, 618 F.2d at 270.[9]

A few cases indicate that if the language policy is a pretext for intentional discrimination or otherwise meets the new, more restrictive disparate impact standard, a language-related rule would violate national origin discrimination rules. *Wards Cove*, 490 U.S. at ____, 109 S. Ct. at 2120; *Jurado*, 813 F.2d at 1410-12 (English-on-the-air rule for bilingual broadcaster not racially motivated); *Vasquez*, 660 F.2d 686.

In addition to these cases explicitly discussing language and national origin discrimination, there are many cases (described in the Statement of Context) in which the courts implicitly rejected the equation of language and national origin by rejecting various national origin-based claims.

There is, therefore, no basis in the terms, history or interpretation of the Fourteenth Amendment to support petitioner's request for a *per se* rule equating the

9 The Fifth Circuit, in *Garcia*, did speculate that: "In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin. . ." 618 F.2d at 270. The Fifth Circuit, however, did not describe what those circumstances might be, limiting its holding only to rejecting the language/national origin equation for bilingual persons. In a later case, the Fifth Circuit upheld a similar English-on-the-job rule for a non-bilingual truck driver. *Vasquez*, 660 F.2d at 686.

language a person speaks and that person's national origin.

2. *A Per Se Rule Equating Language and National Origin Has No Basis in Fact.*

The language a person speaks does not correspond to the usual characteristics of national origin or of a suspect classification under the Fourteenth Amendment. Language classifications do not indicate with requisite specificity the country a person or a person's ancerstors came from. Nor is language an immutable characteristic, like a birthplace.

Spanish is spoken in many countries,[10] impairing a determination that the language itself determines, under *Espinoza*, "the country from which his or her ancestors came." 414 U.S. at 88. Thus, Hispanics are usually within a protected class not by virtue of language spoken, but by ancestry. *Hernandez v. Texas*, 347

10 At least 13 countries have Spanish as their official or national language. A. Blaustein & D. Epstein, *Resolving Language Conflicts: A Study Of The World's Constitutions* (1986).

U.S. 475, 479-80 (1954)(class of persons of Mexican descent wrongfully excluded from jury duty).

A *per se* rule equating language and national origin would be both over- and under-inclusive. Many Hispanics do not speak Spanish.[11] Many non-Hispanics speak Spanish.[12]

Nor is language an immutable characteristic, like "the country from which his or her ancestors came." *Espinoza* 414 U.S. at 88. Although, for some people, learning a new language may be a difficult or unfinished task, *Garcia v. Gloor*, 618 F.2d at 270, in that aspect language may be much like alienage – not statutorily protected.[13] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). Although alienage cannot be changed before qualification for naturalization, it can be changed eventually. *Sugarman v. Dougall*, 413 U.S. 634, 658 (1973)(Rehnquist, J., dissenting)(status as aliens can be changed by affirmative acts).

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11 The Rand Corporation reported in 1985 that by the second generation half the Hispanic immigrant children in California spoke English exclusively. Zall/Jimenez, *supra*, at 35.

12 The American Council of Teachers of Foreign Languages reported that 2,349,738 American high school students were taking Spanish language courses in 1985. Dandonoli, *Report on Foreign Language Enrollment in Public Secondary Schools, Fall 1985*, 50 Foreign Language Annals No. 5, 457-70. Contrary to popular belief, "people who got good grades in high school Spanish classes remembered much of the Spanish vocabulary up to 50 years after taking their last course." *College Classes Spur Lifelong Math Memory*, 138 Science News 375 (1990).

13 A new provision of the immigration law, 8 U.S.C. 1324b (1986), extends some employment protections to aliens.

Absent a basis in either law or fact, a request for a *per se* rule should be rejected. The Court should find alternatives to an absolute rule.

B. A *Per Se* Rule Equating Language and National Origin Is Unworkable.

1. This Case Is Not About English vs. Spanish, But About One Language vs. Many.

More than 140 languages are spoken in the United States. R. Porter, *Forked Tongue: Politics Of Bilingual Education* 5 (1990). Court interpreting services in 57 different languages (including signing for the hearing impaired) were used more than 46,000 times in federal district courts in Fiscal Year 1986. S. Berk-Seligson, *The Bilingual Courtroom* 5 (1990)(*quoting* the Administrative Office of the United States Courts).

Although much of the interpretation in federal courts is for Spanish-language testimony, *Id.*, courts continually adjudicate requests for rights in other languages. *Commonwealth v. Festa*, 369 Mass. 419, 341 N.E.2d 276 (1976), for example, involved Italian; *Wards Cove* involved Eskimo or Aleut languages; and *Lau* involved Chinese.

Many of those languages contain distinct dialects in which the same words mean different things. Berk-Seligson, *supra*, at 5 (citing Italian, Napolese and Sicilian as "different varieties of the same language.").

Some of these dialectical differences could be legally significant, such as the Spanish word "*guagua*", which means "baby" in Nicaragua or Chile, but "bus" in the Dominican Republic. *The Fine Art of Interpreting in a Miami Court*, N.Y. Times, May 8, 1984, at A15, col. 1.[14]

Petitioner's arguments on the connection between language and national origin apply equally to each of these languages, and to many of these dialects. Under *Espinoza*, each of those languages and dialects could "refer[] to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. Dialects which are often more geographically specific, in fact, may be more likely to pinpoint country of ancestry than language alone.

The *per se* rule requested by Petitioner could lead to inquiries or special procedures in the courtroom for each of those hundreds of languages and dialects. *Batson* explicitly allowed consideration of the numerical burden a court would face in adopting a judicial theory: "'The number of our races and nationalities stands in the way of evolution of such a conception' of the demand of equal protection." *Batson*, 476 U.S. at 85, *quoting, Akins v. Texas*, 325 U.S. 398, 403 (1945).

The delays and costs of treating each language spoken in the United States as a potential ground for special treatment might be worthwhile if they were essential to prevent or eliminate discrimination, but, as shown above, language is an inaccurate surrogate for

14 The same article describes a convicted cocaine smuggler being removed from court after sentencing telling a judge "snore the mangoes", which the interpreter rendered as "That really takes the cake." *Id.*

national origin. Thus, no absolute rule equating language spoken to a person's national origin is appropriate and the costs and delays are not constitutionally required.

2. *A Per Se Rule Equating Language and National Origin Would Inevitably Complicate Courts' Already Difficult Language-related Problems.*

> THE COURT: If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the –
>
> DOROTHY KIM [a juror]: I understand the word *La Vado* – I thought it meant restroom. She translates it as bar.
>
> MS. IANSITI: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.
>
> DOROTHY KIM: You're an idiot.[15]

United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981).

The actual language-related courtroom problem highlighted in this case is a potential inconsistency in translation of testimony between the courtroom interpreter and a juror. Petitioner posits the possibility that the court-appointed interpreter might make a mistake which could be corrected by a juror. Pet. Br. 25-26. At least one court reported such a misinterpretation. *Seltzer v. Foley*, 502 F. Supp. 600, 603-4 (S.D.N.Y. 1980)(interpreter in magistrate's courtroom changed the motive of the accused without her knowledge).

15 Actually, the juror was incorrect; the interpretation was accurate. *Id.* at 663.

That possibility, however, is only one possible inconsistency between trained interpreter and juror.

As troubling as the possibility that the interpreter would err is the greater probability that the juror might err. Courtroom interpretation is a difficult art: "[T]here was a mistaken belief abroad that if one was bilingual he or she could interpret; but that just does not follow." *Seltzer*, 502 F. Supp. at 603, 607.[16] A 1985 report found that of 1,400 applicants, only 30 passed the federal certification test for Spanish language courtroom interpreters. *Problems Cited in Greater Use of Court Interpreters*, 16 Crim. Just. Newsl. 13, 2 (1985).

Even if a juror spoke the same language as the witness, differences in dialect or register[17] could also cause error, as with Ms. Kim's erroneous understanding of the name *La Vado* in *Perez*. 658 F.2d at 662-63.

16 In *Seltzer*, interpreters unsuccessfully challenged interpreter certification tests given by the Director of the Administrative Office of the United States Courts.

17 A linguistic "register" is a vocabulary and form of speech specific to a particular setting, like "legalese" in English. *Seltzer*, 502 F. Supp at 606-7 (courtroom English is not regular English).

A Mexican-dialect-speaking juror in a rape case, for example, who heard a Spanish-speaking witness say "*coger*" might believe that the witness has confessed intercourse, where the other jurors might be told by the official interpreter (who presumably would be aware of the appropriate Puerto Rican dialect) that the witness only "grabbed" the person. *The American Heritage Larousse Spanish Dictionary* 113 (1986). Thus a juror who would not rely on the official translation would perceive[18] a different, and more pernicious, element of the testimony.

If a juror believed a witness said something other than the official translation, correctly or not, that juror would likely have an undue influence during jury deliberations. Reuben, *Only An Elephant Never Forgets,* 17 Litigation 1, 51-2 (1990)(notes by two jurors might have undue influence). Jurors would be likely to lend extra weight to the bilingual juror's memory, even crediting it beyond the official transcript of testimony (because the juror was challenging the official translation as inaccurate). Courts could provide verbatim transcripts of the non-English testimony to bolster the official translation, but, if the difference is in word selection, the additional transcript would be wasted be-

18 Although clearly not conclusive, emerging scientific evidence indicates that persons who speak different dialects may *hear* differently. "When a Briton and a Californian listen to Beethoven's Fifth Symphony, they may not hear the same thing. New research indicates that people who speak different dialects of a language perceive tonal patterns in strikingly different ways, supporting long-standing speculations that speech characteristics influence the way people hear music." *Mother Tongue May Influence Musical Ear*, 138 Science News 343 (1990).

cause the word choice of translation was the issue anyway.

The Petitioner suggests that the juror who perceives a different word choice from that used by the interpreter simply pass a surreptitious note to the judge. Pet. Br. 25. Yet such a procedure – a juror passing a note to the judge and receiving an immediate response – would reinforce that juror's influence in the eyes of other jurors.

In addition, the behavior of jurors who believe that court interpreters are wrong can be very disruptive, as in *Perez*. 658 F.2d at 662-63. The juror in *Perez* called the interpreter "an idiot," and was subsequently excused from the jury. *Id.* The trial judge and the defendants found the episode disruptive and disturbing. *Id.*, at 663.

Petitioner seeks, in effect, bilingual jurors as a check on court-appointed interpreters. Pet. Br. 25-26. Yet petitioner has not shown that such a check is needed. Of the 46,000 times federal courts used interpretation services in Fiscal Year 1986, Berk-Seligson, *supra*, at 5, none apparently generated an appeal on language grounds.

The issue, therefore, is how a court should best handle issues of differences in interpretation between jurors and court-certified interpreters. Courts have traditionally held that only the official translation is evidence. *Festa*, 341 N.E.2d at 283. This rule has worked for many years and seems to satisfy the needs of courts and litigants.

A *per se* rule allowing the possibility of inconsistent interpretations in court and in the jury room would undercut the traditional rule and increase the possibility of disruption like that in *Perez*. Again, if risking the

possibility of inconsistent interpretations were essential to avoid discrimination, courts might decide the costs were worthwhile. Yet, in the absence of a legally-cognizable risk of interpreter error which could be remedied by petitioner's suggestion, it is unclear why courts should risk biasing jury deliberations.

C. A *Per Se* Rule Equating Language and National Origin Is Unwise.

This Court should be reluctant to adopt a *per se* rule equating language and national origin for two reasons: to avoid influencing cases in contexts other than jury selection and to avoid involvement in on-going political controversies. A misinterpreted phrase in an opinion from this Court could generate unintended controversies far beyond this case.

Such an absolute rule, although here offered in the context of discrimination in jury selection, inevitably will affect the myriad language-choice conflicts faced by American courts. Because most language-related cases implicate the Equal Protection clause, it would be difficult to fashion a national origin-based test for this case which would not be imported to all of the language-related cases described in the Statement of Context.

In addition, a decision of this Court which equated language choice with national origin inevitably would influence the on-going political and legislative efforts to determine the appropriate degree of governmental involvement in language choice. As noted in the Statement of Context, these debates are highly political.

This Court should be reluctant to enunciate an absolute constitutionally-based doctrine in such a controversial and political area. *Webster v. Reproductive*

Health Services, 488 U.S. 1003, 109 S. Ct. 3040, 3058 (1989); *Jean v. Nelson*, 472 U.S. 846 (1985).

Fortunately, there are alternatives for the Court. Petitioner's request could be denied altogether, or a decision in favor of Petitioner could be handed down without enunciating a broad *per se* rule (adopting instead, for example, a case-by-case analysis to determine whether the language-based claim is a cover for discrimination). If necessary, a rule could be crafted which would apply, by its terms, only to jury selection.

CONCLUSION

Because a *per se* rule equating the language a person speaks with the person's national origin has no basis in law or fact, would be unworkable and would be unwise, amici respectfully request this Court to reject that portion of Petitioner's case which requests such an absolute rule.

Respectfully Submitted,

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No. 89-7545

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

DIONISIO HERNANDEZ,

Petitioner,

vs.

NEW YORK,

Respondent.

On Writ of Certiorari to the
Court of Appeals of New York

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BRIEF FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE COMMONWEALTH OF PUERTO RICO, DEPARTMENT OF PUERTO RICAN COMMUNITY AFFAIRS IN THE UNITED STATES, AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principle objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States.

The Commonwealth of Puerto Rico, Department of Puerto Rican Community Affairs in the United States, is a cabinet level agency of the government of Puerto Rico. Under the laws of Puerto Rico, the department and its secretary, Nydia M. Velazquez, are statutorily authorized to seek intervention in any litigation that affects the civil rights of Puerto Ricans in the United States.

Language discrimination has adversely affected Hispanics in the areas of education, employment, voting rights, as well as a myriad of other areas. The breadth of this discrimination has substantially impeded, and in some instances precluded, Hispanics from the full exercise of constitutional and civil rights. This case represents another example of the continued disparate treatment of Hispanics based upon their linguistic background. For that reason, both of the amici curiae have substantial interest in this case.

The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

Scholarly research has led to the publication of a significant body of work about Hispanics. This includes numerous in-depth studies in the areas of demographics and linguistics. Both fields of expertise have closely examined the utilization and maintenance of Spanish, English language acquisition, and the future of Spanish in the United States.

These analyses reveal the resiliency of Spanish in the United States and the growth of Spanish in a bilingual English-Spanish environment. Not surprisingly, the growth of Spanish closely parallels the growth of the Hispanic population.

Spanish has historically been and remains an identifying characteristic of Hispanics: 97% of the individuals who usually speak Spanish are Hispanic; 72% of all Hispanics claim some level of knowledge of Spanish; and 64% of all Hispanics report being bilingual. These figures reveal the concomitant relationship between Spanish and Hispanics.

There is a lay belief that bilinguals can turn off their Spanish language capability and receive information only in English. However, knowledge of Spanish is an immutable characteristic of the bilingual Hispanic individual. Given the pervasive level of English-Spanish bilingualism in the Hispanic community, Spanish represents an immutable characteristic of the Hispanic community on the whole, interwoven into the identity of all Hispanics.

Requiring bilingual Hispanics to allow to the fidelity of testimony translated into English adversely affects the majority of Hispanics by asking them to act in a manner they intuitively know is not possible. Hesitancy reflects an honest pause to an unlawful question. At the root of the prosecutor's strikes lies unlawful bias: bias against Spanish and Hispanics who understand Spanish.

ARGUMENT

This Court has previously addressed language diversity issues, *Lau v. Nichols*, 414 U.S. 563 (1974); *Wy Cong Eng v. Trinidad*, 271 U.S. 500 (1926); and *Meyer v. Nebraska*, 262 U.S. 390 (1923), but has always assumed without squarely addressing the inextricable correlation between the native language of national origin groups and national origin itself which comprise the identifiable characteristic upon which it is impermissible to discriminate. In the case of Hispanics, this country's second largest minority population and largest linguistic minority group, Spanish is the native language at issue.

Whether disparate treatment based upon the linguistic identity of Hispanics equals national origin discrimination is immediately evident from even summary reviews of the historical presence of Spanish in the United States, the nature of bilingualism, and the continued adverse treatment Hispanics are subjected to because they retain their sociolinguistic identity. This brief will address the pervasive nature of English-Spanish bilingualism, the accompanying sociolinguistic evidence, and finally the need to continue the prohibitions against discrimination to include those adverse actions based on language identity.

Dionisio Hernandez is an Hispanic "Puerto Rican" who was tried by a jury whose selection permitted the intentional exclusion of the only two Hispanics eligible to serve. Hernandez was denied the opportunity to be judged by his peers (Hispanics who are English-Spanish bilingual) because some witnesses had been scheduled to testify in Spanish, which an interpreter would then translate into English. The prosecutor utilized two preemptory strikes to ensure a monolingual (English only) jury, which was then totally dependent on the court

interpreter for translation of all testimony in Spanish to English. The Hispanics were eliminated because, when questioned about their ability to listen only to the testimony as translated into English, they did not respond in a manner acceptable to the prosecutor, *i.e.*, they hesitated.

With the qualification that the benefit of a record of the voir dire examination is not available here, it appears that the Hispanic jurors were treated as English-Spanish bilinguals whose proficiency in Spanish was never determined, and whose delay in responding to inquiry about their ability to rely only on the English version of testimony was interpreted in a negative manner by the prosecutor, leading him, as a monolingual, to question their veracity and assume bias on their part. At no time did the trial court address the issue of Spanish or English-Spanish bilingualism as a characteristic of Hispanics, the capacity of bilinguals to turn off their Spanish language capabilities, or the adverse impact on all Hispanics of allowing their linguistic abilities in Spanish, as bilinguals, to be a "neutral" (legitimate, non-discriminatory) basis on which to exercise preemptory strikes.

Demographic analysis and sociolinguistic research demonstrates that the prosecutor was permitted to eliminate the Hispanics in a manner violative of *Batson v. Kentucky*, 476 U.S. 79 (1986). Spanish, an identifying characteristic of Hispanics, singled out two potential jurors to questioning they answered truthfully. The impact of the prosecutor's action is revealed by examining how representative these potential jurors are of all Hispanics. The adverse impact upon Hispanics as a whole in the absence of a neutral, non-discriminatory reason, therefore, demonstrates the discriminatory nature of the prosecutor's action.

I.
THE DEMOGRAPHIC PICTURE: HISPANICS ARE A BILINGUAL POPULATION.

Spanish has always been treated as an identifying characteristic of Hispanics, often singling out individuals and the community as a whole for adverse treatment. The legal challenges and response make up a significant body of the jurisprudence involving Hispanics. *Hernandez v. Texas*, 347 U.S. 475 (1954) (recognizing Spanish surname persons as a group are protected by the Fourteenth Amendment); *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990) (reversal and remand for new trial once defendant made out a prima facie showing of discrimination in the selection of jurors, by eliminating fluent Spanish-speaking jurors because tapes of the defendant in Spanish would be introduced as evidence); *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), vacated on grounds of mootness, ___ U.S. ___, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989) (striking down an English-only rule); *Zamora v. Local 11, Hotel and Restaurant Union*, 817 F.2d 566 (9th Cir. 1987) (requiring translators at monthly union membership meetings for Spanish-speaking union members); *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986), en banc., vacated on grounds of mootness, 484 U.S. 806 (1987) (recognizing that adverse action against Spanish-speaking persons constitutes unconstitutional discrimination on grounds of national origin); *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575 (7th Cir. 1973) (upholding the use of bilingual materials and assistance in voting); *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2nd Cir. 1970) (Puerto Rican defendant has a Sixth Amendment right to interpreter in felony criminal trial); *Yniguez v. Mofford*, 730 F.Supp. 309 (D.Ariz. 1990) (State

Constitution provision declaring English to be the official language declared unconstitutional); *Perez v. FBI*, 707 F.Supp 891 (W.D.Tex. 1988) (finding additional terms and conditions of employment applied to Spanish-speaking Hispanic employees constitutes illegal discrimination).[1]

In this case, it is important to recognize the significant relationship between Puerto Rico and the United States, and the linguistic characteristics of Puerto Ricans in Puerto Rico and in the United States. In Puerto Rico, although the laws of 1902 reflect that English and Spanish are official languages, see 1 L.P.R.A. §51, Spanish is by far the language of public and private life. Approximately 60% of the residents of Puerto Rico are considered Spanish monolinguals who cannot speak English. El Mundo, July 7 1989. Spanish is the medium of instruction in all public schools, although English is required course of study, New York Times, Sept. 20 1990, and Spanish, as the national language, is the language used in all commonwealth courts and tribunals, *Pueblo v. Tribunal Superior*, 92 D.P.R. 596 (Sup.Ct. of P.R. 1965).

In 1917, Puerto Ricans became citizens of the United States by operation of the Jones Act, 8 U.S.C. §721, *et seq.* Emigration to the United States from

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[1]Congress has similarly recognized that remedial statutes intended in whole or in part to rectify historical discrimination and benefit Hispanics must address their linguistic identity. The statutes include the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, *et seq.* (1988); the Bilingual Education Act of 1968, 20 U.S.C. §§3221-3262 (1982); the Court Interpreters' Act, 28 U.S.C. §1827 (1988); and the Equal Educational Opportunity Act, 20 U.S.C. §1701, 1703(f) (1982).

Puerto Rico in this century has resulted in approximately 2.7 million Puerto Ricans living in the United States today. Linguistically, Puerto Ricans in the United States are neither abandoning their mother tongue, nor resisting English. In New York City, home of the largest Puerto Rican population in this country, 91% of Puerto Ricans still speak Spanish at home, and, simultaneously, 70% of this population speaks English "well" or "very well." C. Rodriguez, *Puerto Ricans born in the U.S.A.* (1989). See also Appendix A, p. 1. The data for Brooklyn (Kings County), New York, where petitioner was tried, reflects the same trend: 96% of all Hispanics in that borough speak Spanish at home. 1980 Census, General, Social, and Economic Characteristics.

The Puerto Rican experience in the United States, including the maintenance of Spanish and acquisition of English, is similar to that of all Hispanic groups in the United States. In fact, the historical presence, use, and growth of Spanish in the United States parallel the presence and growth of the Hispanic population in the United States. See Appendix B, p. 3.

Spanish language maintenance, immigration, along with population growth, have led Spanish to be "the most widely claimed [non-English] language in the United States, and the only major [non-English language] which over the last two decades has not lost but retained and gained claimants." Solé, *Bilingualism: Stable or Transitional? The Case of Spanish in the United States*, 84 The Int'l Journal of Social Languages, p. 36 (1990).

Spanish language claiming encompasses 71.8% of the total Hispanic population. Solé, *supra*, at p. 39. See also Appendix C, p. 4. Hispanics also comprise 97% of the individuals who usually speak Spanish, Estrada, *The*

Extent of Spanish/English Bilingualism in the United States, 2 Aztlan, The Int'l Journal of Chicano Research Studies, p. 381 (1984); see also Appendix D, p. 5, and 76% of those individuals who report Spanish as a second language. Estrada, *supra*, p. 382. It is estimated that at least 64% of Hispanics are bilingual. Estrada, *supra*, p. 383. See also Macias, *National Language Profile of the Mexican-Origin Population of the United States*, Mexican Americans in Comparative Perspective, (W. Connor, ed.), pp. 285-308 (1985).

While recognition of the inherent Spanish bilingual identity of Hispanics has lagged far behind the reality, growing recognition is inevitable in light of the continued and growing presence of Hispanics and English-Spanish bilingualism. Contrary to the myth that anglification is or will shift Hispanics towards English monolingualism, English-Spanish bilingualism remains by far the predominant feature of Hispanics. Spanish language use, maintenance, and intergenerational transmission, along with constant immigration, have institutionalized Spanish as a constant element of Hispanic identity and linguistic repertoire. Given that Hispanics are a stable bilingual community, knowledge of Spanish cannot be permitted to be a basis upon which to exclude potential jurors. The burden of such practices would fall squarely on the shoulders of the Hispanic community.

II.
BILINGUALISM: THE SOCIOLINGUISTIC EVIDENCE.

A.
Hispanic Bilingualism in the United States

Hispanic bilinguals are essentially "circumstantial" bilinguals. Valdes, *The Language Situation of Mexican Americans*, Language Diversity: Problem or Resource, pp. 111-139 (1988). See Appendix E, p. 6. They have acquired their second language in a natural context by having to interact with monolingual and bilingual speakers of English in the work, school or neighborhood domains. As might be expected, there are many different types of bilinguals in Hispanic communities. Some individuals are biliterate, while others read and write in only one of their languages. Some individuals are active bilinguals who speak both languages with some ease, while other bilinguals are passive in one of their languages and can only understand but not speak this "weak" language. Valdes, *supra*; Elias-Olivares, *Ways of Speaking in a Chicano Community: A Sociolinguistic Approach*, Dissertation (1976); E. Hernandez-Chavez, *El Lenguaje de los Chicanos* (1975); F. Peñalosa, *Chicano Sociolinguistics* (1975); Sanchez, *Our Linguistic and Social Context*, Spanish in The United States: Sociolinguistic Aspects (1982); R. Sanchez, Chicano Discourse (1983). See Appendix F, p. 7. So varied indeed are the different types of English-Spanish bilinguals found in Hispanic communities that it is impossible to conjecture about language strengths or weaknesses based on generation, age, schooling, period of residence in this country, or any other such criteria. There are many first generation Hispanic immigrants who acquire English very rapidly, but there are also many who do not. There are many third and fourth generation Hispanics who are still very

fluent in Spanish, but there are also many such individuals who have only a small degree of understanding of their original ethnic language.

It is clear, however, that large numbers of Hispanics are, to a greater or lesser degree, bilingual. It is equally clear that, because they are bilingual, two languages, English and Spanish, are used in their everyday lives. How they are used and why and what role they play in the community are questions that have been studied at great length by many individuals. Sanchez, *supra* (1982); Peñalosa, *supra* (1975); Valdes, *supra* (1988); Sanchez, *supra* (1983).

Recent work on the alternating use of two languages by Hispanic bilinguals (code-switching) has made clear that both English and Spanish <u>together</u> make up the linguistic repertoire of these speakers. A.E. Fantini, *Language Acquisition of a Bilingual Child: A Sociolinguistic Perspective* (1985); Poplack, *Sometimes I'll Start a Sentence in Spanish y Termino en Español: Toward a Typology of Code-switching*, 18 Linguistics (1980); Valdes, *Social Interaction and Code-Switching Patterns: A Case Study of Spanish/English Interaction*, Spanish in the United States: Sociolinguistic Aspects (1982). Hispanic bilinguals, for example, will often switch between languages at the word, phrase, clause, and sentence levels to bring across a series of different types of meanings. A switch to Spanish, for example, by a Hispanic bilingual who is speaking English to another bilingual of the same background, may signal greater solidarity or a reference to values associated with the ethnic language. A switch might also serve, however, as a simple metaphorical device by means of which a speaker gives emphasis to a particular segment of his utterance. G. Valdes-Fallis, *Code-Switching and the*

Classroom Teacher (1979); Zentella, *Code-Switching and Interactions Among Puerto Rican Children*, Spanish in the United States: Sociolinguistic Aspects (1982). What is important is that the use of two languages by Hispanic bilinguals in many informal interactions results in the fact that most members of the community develop the ability to comprehend spoken Spanish.

As is the case with other bilinguals, Hispanic bilinguals are often not conscious of the fact that they are switching languages. Indeed, research shows that when asked to recall the language in which certain information was received, bilinguals have no memory of the input language. They appear to have retained only the information itself. They have not tagged this information in memory according to the language in which it was obtained. Magiste, *The Competing Language Systems of the Multilingual: A Developmental Study of Decoding and Encoding Processes*, 18 Journal of Verbal and Learning Behavior, pp. 79-89 (1979). See also Appendix G, p. 9.

Not surprisingly, it is also the case that bilinguals are seldom aware of why they switch languages or where they switch between their languages in speaking to others. Often, they will have no recollection of the fact that they switched, nor will they be able to bring to their level of awareness how they used a particular language switch to bring across particular nuances or meanings. This lack of memory for language used has been attributed to the fact that bilingual individuals are thought to have a common mental storage for both languages. Kolers, *Memory for Words, Synonyms and Translation*, 6 Human Learning and Memory, pp. 53-65 (1980); Kolers, *Interlingual Word Association*, 2 Journal of Verbal Learning and Verbal Behavior, pp. 291-300

(1983). They do not switch one language on and the other off as they interact with individuals who speak either one or the other of their languages. Both language systems are, instead, constantly switched on. There is no evidence that bilingual individuals of any type have the ability to switch <u>off</u> one of their language systems. Indeed, the only known cases in which one of the languages of a fluent and functioning bilingual is switched "off" are those that involve bilingual aphasiacs (individuals who have suffered brain damage due to a stroke or other such traumatic injury). M. Albert and L. Obler, The Bilingual Brain (1975); Paradis, *Bilingualism and Aphasia*, Studies in Neurolinguistics (1977); Grosjean, *The Bilingual as a Competent but Specific Speaker-Hearer*, 6 The Journal of Multilingual and Multicultural Development, pp. 467-477 (1985). Only in these cases does it occur that an individual cannot access what comes in over one of his language "channels." In all other cases, functioning fluent bilinguals are attending to input which surrounds them. They attend to such input using their two access channels at all times.

B.
Cross-Cultural Communication.

According to John Gumperz, an anthropologist who specializes in the study of cross-cultural communication, "social identity and ethnicity are in large part established and maintained through language"[2] and communicative behavior. Problems occur in communication when individuals do not share the same communicative conventions and thus misinterpret each other's cues and signals.

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[2] J.J. Gumperz, Language and Social Identity, p. 7 (1982).

Accordingly, difficulties arise when individuals of different cultural backgrounds engage in interaction. In Gumperz's words:

> When backgrounds differ, meetings can be plagued by misunderstandings, mutual misrepresentations of events and mis-evaluations. It seems that, in intergroup encounters, judgments of performance and of ability that on the whole are quite reliable when people share the same background may tend to break down. (Gumperz, *supra*, p. 2).

Indeed, as T. Kochman underscored in his book *Black and White Styles in Conflict* (1981), even when individuals speak the same language, problems of misinterpretation and misevaluation also occur. In the case of African Americans and Caucasians, for example, it has been found that attempts at communication across groups frequently fail. See also Hansel & Ajirotutu, *Negotiating Interpretations in Interethnic Settings*, Language and Social Identity (1982). Indeed, because the strategies and rules of speaking in these two groups differ so significantly, they often result in distrust and dislike between individuals.

As might be expected, difficulties are magnified when individuals share neither a language nor a culture. Research has provided numerous examples of the types of seemingly trivial differences (e.g., intonation, voice quality) that can cause serious problems in inter-ethnic and cross-cultural communication. J.J. Gumperz and J. Cook-Gumperz, *Introduction: Language and the Communication of Social Identity*, Language and Social Identity (J.J. Gumperz, ed.) (1982); H. Giles, Language Ethnicity and Intergroup Relations (1977); H. Giles & P.F.

Poweland, Speech Style and Social Evaluation (1975); H. Giles and R. St. Clair, Language and Social Psychology (1979). It is clear from this research that individuals bring to a communicative exchange norms of behavior that involve rules for interacting with others and for using both verbal and non-verbal elements in the process of communicating specific meanings. These rules govern, for example, how turns are allocated during a conversation, how far or how close persons stand to each other when talking, when and why eye contact is made, whether silence is permitted during an interaction, and how gestures, voice quality, tone and the like are used to create emphasis. E.T. Hall, *The Silent Language* (1959); Phillips, *Some Sources of Cultural Variability in the Regulation of Talk*, 5 Language in Society, pp. 81-95 (1976); Gumperz, *supra* (1982).

The relevant research makes clear the fact that when communication takes place between persons of different cultural backgrounds, great care must be taken in interpreting behavioral features surrounding the communication. Individuals cannot assume that certain behaviors (*e.g.*, looking away from the speaker, responding "too" quickly or "too" slowly) have a universal or common meaning.

Spanish language retention in a bilingual or monolingual context continues to provoke a negative response. This reaction to language diversity also reflects a bias against Hispanics. Macias, *supra* (1985). This bias was extended in this case and the rationale for striking the Hispanics from the jury because they understood Spanish. Ignorance about linguistics and the extent of bilingualism led the trial court to sanction the prosecutor's conduct as a neutral, non-discriminatory action based on the myths that have historically hurt Hispanics.

III.
THE HISPANIC JUROR: AN ENDANGERED SPECIES.

Hispanics are a bilingual community whose linguistic repertoire includes both English and Spanish. Bilinguals comprise at least 64% of this country's Hispanic population. What future, if any, Hispanic bilinguals have as jurors is dependent on explicit recognition of the relationship between Spanish and the national origin of Hispanics. Unlawful bias against Spanish speakers was displayed by eliminating the only two Hispanics eligible to serve on the jury. Their knowledge of Spanish is not unique among Hispanics, but reflects a common attribute.

Likewise, their hesitancy before responding in a truthful manner reflects their intuitive insight into the impossible nature of the task requested; listen only to the English version of the testimony.

Bilinguals cannot switch English on and Spanish off. Both language systems are constantly switched on. Requiring bilinguals to act otherwise is contrary to human mental processes.

The question of why these Hispanics delayed in responding to the prosecutor's question cannot be resolved by presuming bias on their part or assuming a negative inference. The likelihood of cross-cultural miscommunication between the prosecutor and the Hispanic is as probable as any other explanation. In this context, it is the prosecutor's burden to dispel the inference of discrimination. This burden cannot be shifted, as the state of New York advocates, to the bilingual juror to demonstrate their fidelity to English because they are suspect jurors, *i.e.*, Spanish speakers.

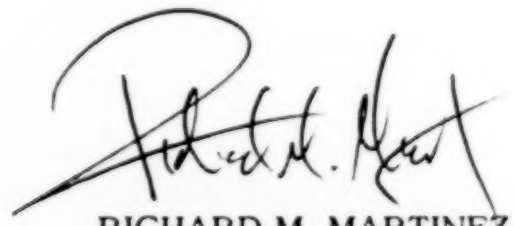
Absent the articulation of a relevant non-discriminatory reason, the inference of discrimination remains. In this case, a neutral, non-discriminatory rationale for striking the Hispanic bilinguals was never articulated.

If the prosecutor had eliminated members of the jury venire who spoke "black English," because he anticipated testimony in "black English," a significant portion of the African American population would be excluded from jury service. The home or community language of Hispanics, or any linguistically diverse population, cannot be allowed to impede their right to equal participation in the jury system. However, absent the court taking affirmative steps to preclude such conduct, the linguistic identity of all bilingual populations will eliminate their participation on juries. *Martin Luther King Elementary School Children et al. v. Ann Harbor District Board*, 473 F.Supp. 1371 (E.D. Mich. 1979).

CONCLUSION

WHEREFORE, *amici curiae* in support of petitioner pray this Honorable Court reverse the decision below as a *per se* violation of the Fourteenth Amendment, or, alternatively, remand this matter to the New York courts to complete the record and provide a full plenary review of the trial court's determination.

RESPECTFULLY SUBMITTED this 28th day of November, 1990.



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No. 89-7645

IN THE

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October Term, 1990

DIONISIO HERNANDEZ,

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NEW YORK,

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Appendix A

English ability of the Spanish-origin Population by ancestry for Selected Areas

	Mexican Amer.	Cuban Amer.	Puerto Rican	Other Spanish	Totals
Arizona					
very well	57.4	52.0	67.4	61.5	57.7
well	24.9	32.0	20.2	25.3	24.9
not well	11.9	16.0	12.4	9.7	11.8
none	5.8	-	-	3.5	5.6
California					
very well	42.9	44.3	58.3	45.2	43.5
well	24.1	23.2	26.1	26.6	24.5
not well	20.1	17.9	11.3	19.0	19.7
none	13.0	14.6	4.3	9.1	12.3
Colorado					
very well	62.6	68.1	65.1	68.5	64.9
well	23.6	21.3	19.8	22.7	23.2
not well	10.7	10.6	13.2	7.5	9.6
none	3.1	-	1.9	1.2	2.4
New Mexico					
very well	60.1	76.5	67.4	66.5	63.3
well	25.5	23.5	19.6	26.2	25.8
not well	9.5	-	13.0	6.2	7.8
none	5.0	-	-	1.1	3.0

Texas					
very well	43.4	55.1	61.7	50.6	43.9
well	32.7	21.2	25.9	28.9	32.4
not well	15.5	14.6	9.4	13.2	15.3
none	8.4	9.1	3.0	7.2	8.3
New York					
very well	44.9	43.0	48.2	35.6	43.7
well	24.9	25.3	29.1	27.6	28.4
not well	18.4	21.2	16.4	23.2	19.0
none	11.8	10.5	6.2	13.7	9.0
Florida					
very well	42.5	38.4	52.8	46.5	41.9
well	29.9	21.9	27.6	26.0	23.8
not well	16.9	19.8	14.3	16.9	18.4
none	10.7	19.9	5.3	10.5	15.8
Illinois					
very well	37.6	44.7	46.4	44.1	40.6
well	25.4	24.6	29.8	30.2	26.9
not well	23.2	22.3	17.6	18.7	21.4
none	13.8	8.4	6.2	7.0	11.1
Totals					
very well	44.5	46.3	52.8	46.1	47.5
well	26.4	23.9	27.2	27.4	26.6
not well	18.0	18.8	15.0	17.4	17.1
none	10.8	10.8	4.8	8.9	8.4

Source: U.S. Bureau of the Census (1980, 1983).

Appendix B

Gross Growth of Spanish-Speaking Population in the United States, 1850-1976, with Projections to 2000[1]

Year	Number of Spanish Speakers in Mainland United States	Population of Puerto Rico	Total Number of Spanish Speakers
1850	118,000	...	118,000
1860	170,000	...	170,000
1870	234,000	...	234,000
1880	333,000	...	333,000
1890	423,000	...	423,000
1900	562,000	953,200	1,515,200
1910	448,200	1,118,000	1,566,200
1920	850,800	1,299,800	2,150,600
1940	1,861,400	1,869,300	3,730,700
1960	3,336,000	2,349,500	5,685,500
1970	17,823,600	2,712,000	10,535,600
1976	10,608,900	3,217,000	13,825,900
1980	11,745,400	3,187,600	14,933,000
1985	13,191,300	3,390,700	16,582,000
1990	14,778,900	3,593,800	18,372,700
1995	16,436,600	3,796,900	20,233,500
2000	18,145,200	4,000,000	22,145,200

[1]Source: R.F. Macias, "Language Diversity among U.S. Hispanics: Some Background Considerations for Schooling and Non-Biased Assessment," in J. Speilberg, ed., *Proceedings--Invitational Symposium on Hispanic American Diversity* (East Lansing, Mich.: Michigan State University and Michigan State Department of Education, 1982), pp. 110-36.

Appendix C

Language of the Spanish-origin Population
by ancestry for selected areas (%)

	Mexican American		Puerto Rican		Cuban		Other Spanish		Totals	
	SP	EN	SP	EN	SP	EN	SP	EN	SP	EN
Arizona	71.9	19.6	58.1	32.6	58.0	36.7	48.7	39.6	69.6	21.6
California	69.1	22.4	60.8	31.9	85.3	11.1	52.5	36.0	66.9	25.3
Colorado	47.3	44.0	47.3	44.1	65.2	23.2	44.3	48.6	51.0	39.9
New Mexico	73.4	18.6	55.6	37.0	55.2	37.9	68.2	25.1	70.6	22.0
Texas	82.6	9.8	67.9	22.1	81.1	13.7	65.4	25.6	81.4	11.0
New York	43.8	45.1	82.3	10.5	84.2	12.1	+76.9	13.6	+79.6	12.5
Florida	57.2	33.9	+78.7	14.8	93.3	3.6	+69.0	22.2	+82.8	11.9
Illinos	71.6	19.4	82.9	8.4	82.2	11.2	58.2	27.2	72.6	17.9
Totals	64.6	26.6	66.7	25.1	75.6	18.7	60.4	29.7	71.8	20.5

Source: U.S. Bureau of the Census (1980, 1983).

Appendix D

Languages Usually Spoken by Persons
4 Years Old and Over, July 1975

Usual Language of Person	Total Persons 4 Years Old and Over	Spanish Origin Persons		
		Number	Col. %	Row %
Total	196,795,910	9,437,770	100.0	4.8
English	188,798,830	5,277,939	55.9	2.8
French	269,897	0	.0	.0
German	131,511	1,780	.0	1.4
Greek	124,497	0	.0	.0
Italian	466,782	1,609	.0	.0
Portuguese	109,907	21,011	.2	19.1
Spanish	4,026,782	3,919,034	41.5	97.3
Chinese	280,210	0	.0	.0
Filipino	111,624	4,654	.0	.0
Japanese	111,430	0	.0	.0
Korean	90,395	0	.0	.0
Other	812,103	19,230	.2	2.4
N.R.	1,477,126	192,513	2.0	13.0

Source: 15 Aztlan International Journal of Chicano Studies Research, p. 381 (1984).

Appendix E

Elective Bilingualism versus Natural Bilingualism

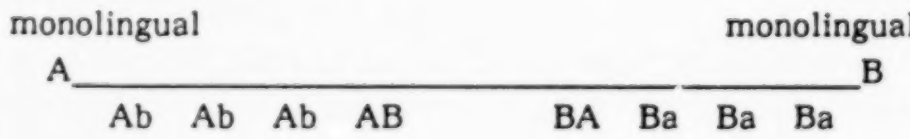
Bilingualism as an individual phenomenon develops under two different kinds of circumstances. On the other hand, an individual may consciously decide to acquire another language and to pursue the study or learning of this language in either formal (classroom) or informal (actual communicative) contexts. This type of conscious, voluntary bilingualism has been referred to as "elective" bilingualism. Persons who study foreign languages and who then seek out contacts with speakers of these languages either abroad or in this country can be said to be elective or elite bilinguals. H. Baetens-Beardsmore, *Bilingualism: Basic Principles* (1982).

On the other hand, "circumstantial" or natural bilingualism occurs when individuals find that their first language (L1) will not suffice to meet all of their communicative needs. In order to participate fully (or simply to survive) in the context in which they find themselves, it becomes necessary to them to acquire a second language (L2) and to use this language in their everyday lives. Circumstantial bilingualism is a characteristic of immigrant groups who must learn to use the original national language. R. Appel and P. Muysken, *Language Contact and Bilingualism* (1987); J.F. Hamers and M.H.A. Blanc, *Bilinguality and Bilingualism* (1989); Valdes, *The Language Situation of Mexican Americans*, Language Diversity: Problem or resource, p. 111-139 (1988); J. Grosjean, *Life with Two Languages* (1982).

Appendix F

The Bilingual Individual

The term "bilingual" as used here, refers to an individual who has "more than one competence," that is, who can function to some degree in more than one language. When one uses this broad definition of bilingualism, one includes into the company of bilinguals all individuals who have either receptive or productive skills, to whatever degree, in more than one language. Grosjean, *supra* (1982); K. Hakuta, *Mirror of Language: The Debate on Bilingualism* (1985); Baetens-Beardsmore, *supra* (1982); Appel and Muysken, *supra* (1987); Hamers and Blanc, *supra* (1989). For example, one classified as bilingual an individual who is a native speaker of English and who can read French, but does not speak or understand the spoken French language. Such an individual is said to have receptive skills in written French and to significantly differ from those persons who have zero skills in a second language. According to this perspective, a bilingual individual is not necessarily an ambilingual (two native speakers in one), but a bilingual of a specific type who along with other bilinguals of many different types can be classified along a continuum. Different types of individuals (all bilingual in language A and language B) might be classified with relation to each other as illustrated in Figure 1. Valdes, *supra* (1988).



The broad definition of bilingualism used here also rejects the popular notion of a true bilingual, an individual who is equally capable in two language, as unrealistic. In order for a bilingual to be equally proficient in both of his/her languages, she would have to balance every experience encountered or carried out in one language with an equivalent experience in the other language. Appel and Muysken, *supra* (1987); Baetens-Beardsmore, *supra* (1982); Fishman, *Who Speaks What Language to Whom and When?* 2 La Linguistique, pp. 67-68 (1965); U. Weinrich, *Languages in Contact* (1974). Since this seldom occurs in circumstantial settings, most bilingual individuals' skills vary over a lifetime. Bilinguals may begin, for example, by being dominant in one language, and yet find that their dominance changes over time. Such changes in dominance or relative proficiency will directly reflect the ways in which bilingual persons have used their two languages, the frequency of their interaction with other speakers of each language, the contexts in which the languages are used, etc.

APPENDIX G

There is a great body of evidence supporting the view that both English and Spanish are perceived as necessary for everyday interaction in the Hispanic community. The following sources are available as supporting evidence in the matters of bilingualism and code-switching.

For additional research on bilingualism itself, K. Diller discusses the facets of bilingualism in *"Compound" and "Coordinate" Bilingualism: A Conceptual Strategy*, 26 Word, pp. 254-261. S. Dornic has written books and articles on the topic, including *Information Processing and Bilingualism* (1977), *The Bilingual's Performance: Language Dominance, Stress, and Individual Differences*, Language Interpretation and Communication (1978), and *Information Processing in Bilinguals: Some Selected Issues*, 40 Psychological Research. Genesee, Hamers, Lambert, Mononen, Seltz and Stark produced an article on language processing in bilinguals which was published in Brain and Language, Volume 5. M. and Y. Lopez published *The Linguistic Interdependence of Bilinguals*, in the Journal of Experimental Psychology. D.E. Lopez discussed Chicano language loyalty in an urban setting in *Sociology and Social Research.*

For information on the way children acquire bilingualism within the family unit, please see Laosa, *Bilingualism in Three United States Hispanic Groups: Contextual Use of Language by Children and Adults in their Families*, 67 Journal of Educational Psychology; Lindholm, *Language Mixing in Bilingual Children*, 5 Journal of Child Language (1978).

Further readings on the multiple use of Spanish and English within the community, and maintenance of the native language, include Floyd, *Spanish in the Southwest: Spanish Maintenance or Shift?*, Spanish Language Use and Public Life in the United States (1985); Galvan, *Marble Terminology in a Bilingual South Texas Community: A Sociolinguistic Perspective on Language Change*, Spanish in the United States, Sociolinguistic Aspects (1982); Limon, *El Meeting: History, Told Spanish, and Ethnic Nationalism in a Chicano Student Community*, Spanish in the United States: Sociolinguistic Aspects (1982); Ortiz, *A Sociolinguistic Study of Language Maintenance in the Northern New Mexico Community of Arroyo Seco* (1975); Pedraza, *Language Maintenance among New York Puerto Ricans*, Spanish Language Use and Public Life in the United States (1985); Sawyer, *Spanish-English Bilingualism in San Antonio, Texas*, El Lenguaje de los Chicanos: Regional and Social Characteristics of Languages Used by Mexican Americans (1975).

For in-depth information on code-switching, please consult the following authors. Piaff, *Constraints on Language Mixing*, 55 Language (1979); Slobin, *Texas Spanish and Lexical Borrowing*, Spanish in the United States: Sociolinguistic Aspects (1982); Lavandera, *Lo Quebramos, But Only in Performance*, Latino Language and Communicative Behavior (1981); Poplack, *Syntactic Structure and Social Function of Code-Switching*, Latino Language and Communicative Behavior (1981); Valdes, *Code-Switching and Language Dominance: Some Initial Findings*, 18 General Linguistics; Valdes, *Code-Switching as a Deliberate Verbal Strategy: A Microanalysis of Direct and Indirect Requests Among Bilingual Chicano*

Speakers, Latino Language and Communicative Behavior (1981).

For articles pertaining to the classroom and how bilinguals are treated in the educational system, please read these books. Zentella, *Ta Bien, You Could Answer Me En Qualquier Idioma: Puerto Rican Code-Switching in Bilingual Classrooms*, Latino Language and Communicative Behavior (1981); McClure, *Formal and Functional Aspects of the Code-switched Discourse of Bilingual Children*, Latino Language and Communicative Behavior (1981).